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NOTES OF INDIAN CASES.

NAWAB BAHADUR OF MURSHIDABAD *v.* KARNANI INDUSTRIAL BANK, LIMITED, L. R. 58 I. A. 215: I. L. R. 59 Cal. 1: 61 M. L. J. 208 (P.C.).

A limited estate in certain lands was granted by the Secretary of State for India in Council to the Nawab of Murshidabad and his heirs subject to certain conditions for the upkeep of the dignity of the Nawab for the time being and their Lordships held, in this case, that the grant did not amount to a "pension" within the meaning of section 60 (1) (*g*) of the Civil Procedure Code, or the Pensions Act or section 6 (*g*) of the Transfer of Property Act. Their Lordships have also given a definition of the term "pension" in the above enactments as implying a periodical payment of money by the Government to the pensioner. While the matter is clear on the Indian decisions where the grant is of the land itself, as in the case under notice, there is a marked conflict of authorities if the grant is an assignment of land revenue. On the language of the Pensions Act itself, there is much to be said for the view that an assignment of land revenue is contradistinguished in the Act from the term "pension" and that therefore it cannot amount to a pension within the meaning of that Act or the analogous provision of the Civil Procedure Code or the Transfer of Property Act. This is the view which has been taken by a Full Bench of the Bombay High Court in *The Secretary of State for India in Council* v. *Khemchand Jeychand*[1] and it has been followed in Madras in *Subraya Mudali* v. *Velayuda Chetty*[2], *Jogirdar Rama Rao* v. *Kottippi Thimma Reddi*[3] and

1. (1880) I. L. R. 4 Bom. 432 (F.B.).
2. (1906) I. L. R. 30 Mad. 153. 3. (1919) 11 L. W. 398.

Varadayya v. *Nammalwar*[4]. The latest decision of the Allahabad High Court where the previous cases of that Court have been referred to seems to lay down that an assignment of land revenue may be a pension within the meaning of the Pensions Act. See *Lakhmi Chand* v. *Madho Rao*[5]. The learned Judges in this case do not refer to the Full Bench decision of the Bombay High Court or the Madras decisions referred to above. So far as the Lahore High Court is concerned, there are two decisions of Division Benches in the same volume where contradictory views have been taken; apparently the attention of the learned Judges in the later case was not drawn to a decision given less than two months prior thereto where it had been held after a careful review of the decisions that a grant of land revenue would not be a pension within the meaning of the Act. See *Dunichand* v. *Gurmukh Singh*[6] and *Atma Ram* v. *Kehar Singh*[7]. If the definition given by their Lordships of the term in the case under notice is strictly adopted, it may be open to argument that an assignment of land revenue may not amount to a pension within the meaning of the enactments. Even viewed from the policy of the law, it may perhaps be suggested that it is not be advisable to enlarge the categories of inalienable property.

GHASIRAM GOENKA *v.* HARIBUX GOBARDHANDAS, I. L. R. 59 Cal. 31.

In this case, an application was made to set aside a consent decree against a defendant which had been passed at the instance of his counsel by reason of his position as such in the suit, without his having consulted the client who was present, though the fact of his presence was not known to counsel. The application was granted by the first Court but refused by the appellate court on the ground that the absence of the consent on the part of the client to the course adopted by counsel under such circumstances was no ground for setting aside the decree which was agreed to by his counsel.

At one time, there was some doubt whether counsel in this country had the same power to compromise suits, especially in the mofussil and whether the English rule should be followed. But after the decision of the Privy Council in *Sourendra*

4. (1909) 20 M. L. J. 88
5. A. I. R. 1930 All. 681.
6. A. I. R. 1930 Lah. 816.
7. A. I. R. 1930 Lah. 904.

Nath Mitra v. *Tarubala Dasi*[1] it must be taken as settled that the English rule applies to this country and in the mofussil. The case under notice was, it may be mentioned, one on the original side of the High Court.

Then, the question arises as to the effect of the consent of counsel when his client is present in court. Reliance was placed before the learned Judges on some observations in *Matthews* v. *Munster*[2] which was itself a case where the client was not present and the counsel agreed to a judgment in his absence. But there are cases where the question has been considered in which the client was present in court and which may be noticed here. *Chambers* v. *Mason*[3] was a case where the party was present and the counsel went into court after consulting the client saying that he would do what was best for the client and agreed to an order. The consent order was sought to be set aside by the client on the ground that he did not understand what was going on in the court; and it was held that the court would not enquire into the truth of such allegations and that he must be taken to have acquiesced in the order. In *Lynch* v. *Cowell*[4] the client was present throughout, but he did not interfere in the proceedings; the solicitor's clerk objected to the terms proposed by the counsel, still it was held that the counsel's consent bound the party, though the learned Judge observed that the court might interfere if the counsel exercised a clearly wrong discretion. In the later case of *Rumsey* v. *King*[5] the plaintiff was present in court and objected to his counsel agreeing to a compromise but he did not do so openly to the court when the compromise was formally announced to the court by the counsel. Still a very strong court composed of Cockburn, C.J., Blackburn and Lush, JJ., held that the compromise was binding on the client, as he did not protest and protest openly at the time to the court. In the face of these decisions, there can be no doubt the decision of the appellate court under notice is the only one that can be given under the circumstances and for the reasons given by the learned Judges. We may perhaps add that the authority of *Rumsey* v. *King*[5] is not weakened by the decision of the House of Lords in *Neale*

1. (1930) L. R. 57 I A. 133 : I. L. R. 57 C. 1311 : 58 M.L.J. 551 (P.C.).
2. (1887) 20 Q.B.D. 141.
3. (1858) 5 C.B. (N.S.) 59.
4. (1865) 12 L.T. (N.S.) 548.
5. (1876) 33 L.T. (N.S.) 728.

v. *Gordon Lennox*[6] where it was held that if a counsel whose authority has been limited by his client agrees in court in disregard of the limitation, the consent so given will not be given effect to by the court, as it has been held that it has only reference to a stage when the order of the court is not drawn up. See *Shepherd* v. *Robinson*[7] and *Little* v. *Spreadbury*[8].

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6. (1902) A. C. 465.
7. (1919) 1 K. B. 474 (C.A.).
8. (1910) 2 K. B. 658.

BISESWAR CHAUDHURI *v.* KANHAI SINGH, I. L. R. 11 Pat. 9.

Section 53 of the Provincial Insolvency Act applies only to a case of a transfer *by* the insolvent. It can have no application to cases where it is alleged that a purchase of property in the name of a third person was really benami for the insolvent. Such a case raises a question of title which can be acquired into under S. 4 of the Act. It is well established now, by a preponderance of judicial authority, that the terms of S. 4 are very wide so as to confer jurisdiction on Insolvency Courts to enquire into and adjudicate such cases even as against the claims of third parties, strangers to the insolvency proceedings. The words of this section are even wider than the corresponding sections of the Presidency Towns Act and the English Bankruptcy Act. The expressions 'title' and 'of any nature whatsoever' are deliberately used by the Indian Legislature to repel the suggestion that the *ejusdem* rule of construction is applicable.

The decision under notice also holds that S. 53 applies only to cases of a real transfer by the insolvent whereby title has passed to the transferee and that cases where it is alleged that an ostensible transfer is really a sham proceeding, not intended to pass title, can be enquired into under S. 4, irrespective of the limitation as to the period of time provided for by S. 53. S. 4 is no doubt controlled by the other provisions of the Act. This only means that such proceedings as come under the other provisions cannot be dealt with under the general provisions of S. 4 wherever special provisions are made for such cases. But transactions which do not come under such provisions may, at the discretion of the Insolvency Court, be properly enquired into in proceedings under S. 4. As in a pure benami transaction no real transfer at all is effected, such cases come under S. 4. Such transfer deeds do not require to be set aside. *Pether-perumal Chetty* v. *Muniandi Servai.*[1] It should, however, be remembered that the substantive law applicable is different. Wherever S. 53 applies, if the conditions mentioned in that section are satisfied, a Court will annul the transfer. But under S. 4 either the wider requirements of S. 53 of the Transfer of Property Act will have to be satisfied or the title must be found to be actually subsisting in the insolvent. The scope of the two

1. (1908) L. R. 35 I. A. 98 : I. L. R. 35 Cal. 551 : 18 M. L. J. 277 (P. C.).

sections is thus different. It may also be noted that there is a curious difference as regards the appealability of orders under S. 4 and S. 53. Orders under S. 4 are subject to a second appeal also, while an order under S. 53 annulling a transfer by a District Court is subject to only one appeal, and an order refusing to annul such transfer is appealable only with leave of Court. There is also an anomaly with regard to forum of appeal even in cases where orders are passed under S. 4. All decisions of Subordinate Courts under S. 4 are appealable only to the District Court irrespective of the value of the subject-matter whereas if the Insolvency Court refers the parties to a civil suit as it can under S. 4 and the question of title is decided by the ordinary Civil Court, the appellate forum varies with the value of the subject-matter of the suit.

RAGHUBANS NARAIN SINGH *v.* KHUB LAL SINGH, I. L. R. 11 Pat. 22 (P. C.).

A co-sharer of lands held in common is entitled, subject to paying *compensation* to the other co-sharers, to cultivate any part of it which is not being cultivated by them. The other co-sharers are not thereby ousted. They cannot obtain a decree in ejectment nor any mesne profits. The possession and cultivation being lawful and not wrongful there is no question of mesne profits. O. 20, R. 12 cannot therefore strictly apply to such cases. It would not, however, follow from this, as the Judges of the High Court thought in the above decision of the Privy Council, that the Court is not competent to decree compensation for the period subsequent to the institution of the plaint. The principle underlying the well-known decision of *Watson & Company* v. *Ramchund Dutt*[1] is a far-reaching one and, as pointed out by the Judicial Committee in the decision under review, considerations of justice equity and good concience can always be invoked by the Court to do full justice to the rights of parties and adjust the same as a matter of substantive law.

Even apart from this, on a right construction of the decree of the Court in the particular case, the successful party must be deemed to have been awarded compensation till the surrender of lands. On this point references may also be made to the

1. (1890) L. R. 17 I. A. 110: I. L. R. 18 Cal. 10 (P. C.).

decisions of the Privy Council dealing with similar orders *re* mesne profits. *Gurudas Kundu Chowdhury* v. *Hemendra Kumar Roy*,[1] *Fakharuddin Mahomed Ashan* v. *The Official Trustee of Bengal*.[2]

SACHINDRA MOHAN GHOSE *v.* RAMJASH AGARWALLA, I. L. R. 11 Pat. 98.

The learned Judges prefer to follow the decisions of the Calcutta High Court holding that not all decrees and orders are excluded from compulsory registration but only those which partake the character of documents mentioned in clauses (*b*) and (*c*) of sub-sec. 1 of S. 17 of the Registration Act. The Madras Court held in *Natesa Chetty* v. *Vengu Nachiar*[3] that all kinds of decrees and orders of Court were exempt from compulsory registration and that sub-clause (*vi*) of sub-sec. (2) was only an unnecessary and misleading surplusage. We think this view can no longer be supported. Not only is the language of the clause clearly to the contrary but the later history of the sub-clause shows that the Madras Court's argument is not tenable. Under the unamended sub-clause, there was a conflict of views as to whether compromise decrees which embody terms other than those relating to the subject-matter of the suit can claim the benefit of the exemption. In 1919, the Privy Council decided in *Hemanta Kumari Debi* v. *Midnapore Zamindari Co.*[4] that even such decrees come under sub-clause (*vi*). Since the above decision, however, the Indian Legislature has by Act XXI of 1929 amended, sub-clause (*vi*) by excluding such decrees and orders from the benefit of the proviso. This shows that the proviso cannot be taken to be an unnecessary surplusage as it would be meaningless to amend it if all kinds of decrees aad orders do not come under any clause of S. 17 at all. It follows that decrees which are documents coming under cl. (*d*) of S. 17 will require registration and, if unregistered, cannot be admitted in evidence to affect transactions relating to immovable property. Where, as in the decision under review, an unregistered compromise decree created a lease of properties and made the rent a first charge on certain specified properties,

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1. (1929) L. R. 56 I. A. 290: I. L. R. 57 Cal. 1 : 58 M. L. J. 74 (P. C.).
2. (1881) L. R. 8 I. A. 197: I. L. R. 8 Cal. 179 (P. C.).
3. (1909) I. L. R. 33 Mad. 102. 20 M. L. J. 20.
4. (1919) L. R. 46 I. A. 240: I. L. R. 47 Cal. 485: 37 M. L. J. 525 (P. C.).

the terms as to the charge would not be admissible in evidence under S. 49.

MUKHDEO SINGH *v.* HARAKH NARAYAN SINGH, I. L. R. 11 Pat. 112.

This is yet another decision dealing with the question, *viz.*, "When does the money become due under Art. 132 of Limitation Act in the case of an instalment-mortgage-bond with a default clause". There is a settled conflict of views on this point among the Courts, the Allahabad and Madras view being diametrically opposite. The Privy Council have refrained from deciding the question though they recognised the conflict and also made some important observations bearing on the point. See *Pancham* v. *Ansar Husain*.[1] In the above decision of the Patna Court, the Judges have come to the same conclusion as the Madras High Court, but by a slightly different process of reasoning. Reliance is placed upon the analogy of S. 23 of the Act. The Court construed the terms of the default clause as giving rise to recurring or successive causes of action, each cause of action giving rise to a fresh start to the period of limitation. This part of the reasoning may not be quite convincing but the conclusion of the Court may well be supported as the right one. The question is fully discussed in the light of the conflicting decisions and general principles in Mitra's book on Limitation, Vol. II, pp. 1261-1266 (6th Ed.).

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1. (1926) L. R. 53 I. A 187: I. L. R. 48 All. 457 (P. C.).

PRAMATHACHANDRA KAR *v.* BHAGWANDAS MADANLAL, I. L. R. 59 Cal. 40.

A division bench of the Calcutta High Court has laid down, in this case, that dormant partners, or, to be more accurate, persons who were not known to be partners before the dissolution, are not outside the scope of section 264 of the Indian Contract Act and cannot escape liability for transactions subsequent to their retirement in the absence of the notice referred to in the section. In coming to this conclusion, the learned Judges recognize that they are departing from the whole weight of authority in Bombay and the English law on the subject.

At the outset, it may be mentioned that the language of section 264 of the Act is not as happy as it might be, with the result that the courts have been obliged to take liberties with it. The latest of such instances was when the Privy Council in *Jwaladutt Pillani* v. *Bansilal Motilal*[1] held following *Chundee Churn Dutt* v. *Eduljee Cowasjee Bijnee*[2] that an old customer was entitled to specific notice and that public notice alone would not exonerate a retired partner from liability for contracts entered into after his retirement. Again, as regards the words "persons dealing with a firm" in the section, there is some conflict of opinion as to whether they have reference only to old customers who still carry on dealings after the dissolution but whether they include also to customers who deal for the first time after the dissolution. See *Gorio* v. *Vallabhdas*[3] and *Bichhia Lal* v. *Munshi Ram*[4] and contra *Jagatchandra Bhattacharjee* v. *Gunny Hajee Ahmed*[5], *Chenchu Venkatanagiah Chetti* v. *Padmanabhan*[6], *Jwaladutt Pillani* v. *Bansilal Motilal*[7] and *Bhaishankar* v. *Lakshmi Dyeing Works*[8], though the better view seems to be that the language is more comprehensive. Again, the generality of the language of section 264 would seem to cover the case of dissolution of a partnership by the death of a partner as well, though it is specifically provided for by section 261 and may not therefore be said to fall under section 264.

Coming to the case of dormant partner's liability for future dealings of the partnership after his retirement, the law

1. (1929) L. R. 56 I. A. 174 : I. L. R. 53 Bom. 414 : 56 M. L. J. 739 (P.C.).
2. (1882) I. L. R. 8 Cal. 678.
3. (1915) 17 Bom. L. R. 762.
4. A. I. R. 1922 Lah. 466.
5. (1925) I. L. R. 53 Cal. 214.
6. A. I. R. 1928 Mad. 125.
7. A. I. R. 1927 Bom. 560.
8. A. I. R. 1930 Bom. 449.

in England at the date of the passing of the Indian Contract Act was undoubtedly that he was not liable even in the absence of a notice of the dissolution by his retirement. *See* Lindley on Partnership, Eighth edition, pp. 78 and 256. The matter is made perfectly clear under the English Partnership Act of 1890, section 36. It is significant to notice in this connection that Indian conditions do not seem to require a different treatment and, indeed, the Indian Partnership Act (IX of 1932) passed recently and which will come into force on the 1st October, 1932, has adopted the English rule in this respect in sections 32 and 45 of the enactment.

The Indian case-law under section 264, but for the decision of a single Judge in *Gorio* v. *Vallabhdas*,[3] which has not been followed in later cases in Bombay, has been uniform. The earliest decision was of the Madras High Court in *Ramasami* v. *Kadar Bibi*[9] as early as 1886. This decision is not noticed by the learned Judges in the case under notice. Though the judgment in the Madras case which adopted the English rule is not very full, it can hardly be that all the aspects were not placed before the learned Judges by the eminent counsel that appeared in it. In *Bichhia Lal* v. *Munshi Ram*[4] the provisions of section 264 have been held to enact only a species of estoppel by holding out, in which view, a dormant partner would not be liable for subsequent dealings. In this state of the authorities, we venture to think that there is not much to be said for the rather too literal construction of the words of the section which the learned Judges in this case have adopted.

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3. (1915) 17 Bom. L. R. 762.
9. (1886) I. L. R. 9 Mad. 492.
4. A. I. R. 1922 Lah. 466.

VELLAIYAPPA CHETTY *v.* NATARAJAN, I. L. R. 55 Mad. 1: 61 M. L. J. 522 (P. C.).

In this case their Lordships examine the theoretical basis of the claim of an illegitimate son of a Sudra for maintenance and maintain that claim as against the joint family estate of his putative father and the collaterals after the death of the former. That the provisions of Mitakshara in Chapter I, section 12 which provide for succession of the illegitimate son of a Sudra and for maintenance in the other cases, is confined to property to which the son succeeds, and that it does not extend to joint family estate of the father with collaterals, was not contested, before their Lordships. The provision for maintenance therein besides is only as regards the illegitimate sons of the three higher classes. Even so their Lordships hold that the illegitimate son is a member of the family as recognised in S. 12 of the Mitakshara and by the Privy Council in *J. B. Hurrochundra Mahapatra* v. *N. Man Sing*[1] and that the general principle of Hindu Law is that a member of the family who is excluded from a share is entitled to maintenance and that accordingly the illegitimate son is entitled to maintenance against the joint estate from which he is prevented from taking a share. The assimilation of the position of the illegitimate son to that of widows and other disqualified heirs led inevitably to the further conclusion that not only future but also past maintenance could be awarded, and that it could be charged on the joint estate and finally that it is not confined to the period of the illegitimate son's minority, but extended to the whole life. In *Ranoji* v. *Kandoji*[2] Mr. Justice Muthuswami Aiyar had expressed the opinion that the share was in lieu of maintenance rather than the maintenance being in lieu of a share. That was before 18 C. 151 (*J. B. Hurrochundra Mahapatra* v. *N. Man Singh*) where the Privy Council recognised the status of an illegitimate son as a member of the family entitled to take by survivorship the share of the legitimate son. This ruling will not, however, apply to illegitimate sons generally, that is to say, for instance, children of adulterous union. Their case must stand on a different footing.

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1. (1890) L. R. 17 I. A. 128: I. L. R. 18 C. 151 (P. C.).
2. (1885) I. L R. 8 M. 557.

LOUIS DREYFUS & CO. *v.* ARUNACHALA AYYA, I. L. R. 55 Mad. 93: 61 M. L. J. 623 (P. C.).

The judgment from which this appeal arose is reported in *27* L. W. 267. Numerous important questions arose in the case and were considered by the Appellate Court. The first question was whether an arbitration clause in a Dubash agreement entered into by one of the partners bound the other partners. Mr. Justice Waller held that as the arbitration clause was a usual form of Dubash agreement, it was within the competency of the partner. The Appellate Court held that Dubash agreement with arbitration clause was not a necessary incident of the trade which the partnership was carrying on. Their Lordships do not decide the question but hold that the four contracts in question adopt the arbitration clause and therefore apart from the Dubash agreement, the clause was binding by reason of its incorporation in the contract.

The second point was one of *res judicata.* On appeal from the order of the first Court, setting aside the award, the Appellate Court remitted the award without expressing any final opinion as to the binding nature of the agreement to refer. The question was whether in these circumstances the validity of the agreement of reference was *res judicata.* The Appellate Court held that as there was no decision on the question by the Appellate Court, the matter being apparently reserved for consideration after the return of the award, it was not *res judicata.* The Privy Council held that the matter was *res judicata* as whatever the reason of the judgment the remission could have been done only on the footing that the respondent was bound by the submission to arbitration.

The further question was whether taking independent legal advice on an important question of law involved in the case constituted misconduct on the part of the arbitrator. The Appellate Court held it was. Their Lordships hold otherwise, observing "the precise length to which an arbitrator may go in seeking advice upon matters of law may be difficult to prescribe in general terms . . . In their Lordships' judgment, the language of the award does no more than indicate that the umpire took advice upon the general rules of law bearing upon the case and does not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon. The case is not strengthened because the umpire in the exercise of his discretion refused to state a special case."

HARIDAS BASU *v.* NATIONAL INSURANCE COMPANY, LIMITED, I. L. R. 59 Cal. 199.

In this case, the learned Judges have held following the leading case of *Begg, Dunlop & Co.* v. *Jagannath Marwari*[1] that a simple contract debt due by a person resident outside the executing Court's jurisdiction cannot be attached or sold by that court and that such a sale will not confer any right to the debt on the purchaser. The question about the *situs* of a debt was discussed very fully by Sir Asutosh Mookerjee, J., in *Begg, Dunlop & Co.* v. *Jagannath Marwari*[1] with reference mainly to American authorities and the learned Judge came to the conclusion that a contract debt is situated in the place of the residence of the debtor. It may be noticed here that the question was not till recently free from doubt in England though it was laid down as early as the reign of Queen Elizabeth in *Byron* v. *Byron*,[2] a case of administration of the estate of a deceased person, that in the case of a specialty, the debt is where the bond is and in the case of other contracts, the debt followed the debtor. The same view has been followed in cases of probate and succession duty in *Commissioner of Stamps* v. *Hope*[3] and *Rex* v. *Lovitt*.[4] But when we come to other branches of law, as for instance, under the English Stamp Act, the decisions before 1931 were to the effect that a debt had no local situation. The English Stamp Act exempts from *ad valorem* duty agreements for the sale of property situate outside the United Kingdom and the question was whether debts due by persons resident outside fell within the exemption and it was held by the English Court of Appeal, in *Velasquez, Limited* v. *Inland Revenue Commissioners*,[5] *Smelting Company of Australia* v. *Commissioners of Inland Revenue*[6] and *Danubian Sugar Factories* v. *Inland Revenue Commissioners*[7] that though they answered the description of property they were not situated outside the United Kingdom on the ground that debts had no local situation and the cases of probate and succession duty were distinguished as based on the inability of local courts to administer assets where the debtors were resident outside the jurisdiction. In the recent case of *English Scottish and Aus-*

1. (1911) I. L. R. 39 C. 104.
2. (1596) 1 Croke Eliz. 472.
3. (1891) A. C. 476 at 481, 482.
4. (1912) A. C. 212.
5. (1914) 3 K. B. 458.
6. (1897) 1 Q. B. 175.
7. (1901) 1 K. B. 245.

tralian Bank, Ltd. v. *Inland Revenue Commissioners*[1] the whole question came under review before the House of Lords and their Lordships have held, overruling the decisions of the Court of Appeal referred to above, that simple contract debts being property have a local habitation, though only notionally and that their situation is the place of residence of the debtor and that it is a general principle running through all branches of law and not merely restricted to probate or succession duty. If this general principle is recognised, the circumstance that the debt is repayable in some other place than the residence of the debtor will make no difference and the *situs* of the debt will still be the place of residence of the debtor, as pointed out by the learned Judges in the present case.

It remains to notice only one other point decided in this case, namely, that the word "may" in S. 39 (1) of the Civil Procedure Code ought not to be understood as implying a mere discretion in the court which passed the decree but as having the force of "shall" when the conditions specified in the section exist. There does not seem to be any previous decision to that effect; but it is a well-recognised rule of construction, the conditions under which it can be invoked have been pointed out by the House of Lords in the leading case of *Julius* v. *Lord Bishop of Oxford.*[2] See also Maxwell's Interpretation of Statutes, 7th edition, pp. 210 *et seq.*

PRABASHINEE DEBI *v.* RASIKLAL BANERJI, I. L. R. 59 Cal. 297.

In this case, the rents due from certain tenants were transferred by the landlord when a suit by him for the same was pending and the transferee sought to execute the decree under O. 21, R. 16 after the decree was passed in the suit, on foot of the transfer of the rents to him and the learned Judges have held that he could not do so, following the decision in *Mathurapore Zamindary Co., Ltd.* v. *Bhasaram Mandal*[3] rather than *Ananda Mohon Roy* v. *Promotha Nath Ganguli*[4]. It might have been better if the question had been referred to a Full Bench to put an end to the conflict.

It must be noticed, at the outset, that in the earlier decisions which have been followed, the Judges that took part regretted

1. (1932) A. C. 238.
2. (1880) 5 A. C. 214.
3. (1924) I. L. R. 51 Cal. 703.
4. (1920) 25 C. W. N. 863.

the conclusion which they thought they were compelled to arrive at on the language of the statute. See *Bhandari* v. *Ramachandra*[1] and *Thakuri Gope* v. *Mokhtar Ahmad*,[2] especially the judgment of Bucknill, J., in the latter case. While thus learned Judges have felt that it is a case of hardship and they have not been able to do justice as they conceived it, it may not be inappropriate to examine the matter somewhat closely.

If in the case under notice, the instrument of transfer had purported specifically to assign the decree which may be passed thereafter in the suit whether, even then, the learned Judges would have come to the same conclusion is not clear. It would, however, seem that on the view of the learned Judges that there should be a decree in existence before it could be transferred, the decision would have been the same, even if the instrument provided specifically as above.

We, however, venture to think that these hardships could have been avoided if the expression "by operation of law" in O. 21, R. 16 is properly understood and given its full scope by including within it equity as well. To a lawyer, as distinguished from the layman's use of the word, "equity" does not mean something divorced from law but only a branch of law which was formerly administered in England by a different set of courts but which is now administered there by all courts after the Judicature Acts. Indeed, this nature of equity will be evident from any definition of the word in the leading textbooks. See, for instance, Halsbury's Laws of England, Vol. 13, page 4, where it has been defined as the system of *law* which prior to the fusion of law and equity effected by the Judicature Acts, 1873 and 1875, was administered in the Courts of Chancery. In this country there is no basis even for this historical distinction. If, therefore, equity is really a branch of law, there can be no difficulty in bringing cases where future property, such as decrees to be passed hereafter, is transferred within the meaning of the expression "by operation of law". With all respect, it is difficult to see what warrant there is for restricting the word "law" in O. 21, R. 16 of the Civil Procedure Code to signify the law of succession, insolvency or statute law alone as has been done in some of the cases. Cf. *Mathurapore Zamindary Co., Ltd.* v. *Bhasaram Mandal*[3] and *Abdul Kader* v. *Daw Yin*.[4]

1. (1906) 17 M. L. J. 391.
2. A. I. R. 1922 Pat. 563.
3. (1924) I.L.R. 51 C. 703 at 708.
4. A. I. R. 1930 Rang. 308 at 310.

The effect in equity of the transfer of property not in existence, such as a decree that may be passed in the future may be noticed here. Such a transfer operates as an agreement to transfer the decree when passed; and as soon as the decree is passed, equity acting on the principle that equity considers that as done which ought to be done, treats the decree as transferred to the person to whom it ought to be transferred. See *Collyer* v. *Isaacs*,[1] per Jessel, M.R. This principle is well recognised in England from early times. See *Holroyd* v. *Marshall*[2] and *Tailby* v. *The Official Receiver*[3] and Halsbury's Laws of England, Vol. 13, pp. 74 and 104. That the rule is not restricted to any species of property is clear from the decision of the House of Lords in *Tailby* v. *The Official Receiver*.[3]

This rule has been followed in this country in the case of decrees to be passed in future in *Palaniappa* v. *Lakshmanan*[4] by Muttusami Ayyar and Wilkinson, JJ., and no good reasons are given in *Bhandari* v. *Ramachandra*[5] for not following it unless the reason is that equity is not law which, we submit, is not correct. It is not also clear how the use of the word "decree-holder" in O. 21, R. 16 militates against the view adopted in *Palaniappa* v. *Lakshmanan*.[4] This view has also been taken in Bombay by Sir Charles Sargent, C. J., and Bayley, J., in *Purmanand Das Jiwandas* v. *Vallabdas Wallji*,[6] which so far as we are able to see has not been dissented from by that High Court. Further, there seems to be no justification to restrict the application of this rule of equity to certain specified classes of cases alone, such as trustees and *cestui que trust*, as suggested in *Abdul Kader* v. *Daw Yin*,[7] where the learned Judges seem to recognise that their observations on this question are wholly *obiter*. We, therefore, venture to submit that the view which found favour in *Purmanand Das Jiwandas* v. *Vallabdas Wallji*,[6] *Ananda Mohon Roy* v. *Promotha Nath Ganguli*[8] and *Palaniappa* v. *Lakshmanan*[4] is more in consonance with justice and principle.

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1. (1881) 19 Ch. D. 342 at 351.
2. (1862) 10 H. L. C. 191.
3. (1888) 13 A. C. 523.
4. (1892) I. L. R. 16 Mad. 429.
5. (1906) 17 M. L. J. 391.
6. (1887) I. L. R. 11 B. 506.
7. A. I. R. 1930 Rang. 308.
8. (1920) 25 C. W. N. 863.

MUHAMMADI *v.* MUNICIPAL BOARD, AGRA, I. L. R. 54 All. 1.
EMPEROR *v.* PUTTU LAL, I. L. R. 54 All. 5.

These are interesting cases more for the attitude adopted by the Court in the interpretation of the rules concerned than the particular points decided. In the first, the question was whether the provision of the Municipal Act which authorised the Municipal Board to make bye-laws prohibiting prostitutes from residing in a specified area within the municipal limits justified its making a bye-law requiring the prostitutes to reside in a particular area and it was held having regard to the principle that statutes that encroach on private rights should be strictly construed that such a restriction was not justified. If instead of restricting them to a particular area, the bye-law had prohibited them from residing in the bulk of the municipal area, the Board might have been formally correct and then the question would have been as to whether it was a reasonable exercise of the rule-making power. It is somewhat difficult to believe that the validity of a particular Act should depend on shades of language which do not involve any difference in principle. In determining the question whether the exercise of the power was reasonable, probably the fact that the Act has not for its object segregation with a view to proper control or regulation but only the keeping of specified parts free from contamination possibly owing to special features connected with those parts may be a very valuable factor for consideration.

In the second case the question was whether the prohibition in a liquor shop licence against keeping the shop open at specified hours amounted to a prohibition of keeping it closed during the other hours. It was held that it did not and the conclusion seems obvious. But the Lower Court had convicted the man for breach of the conditions of the licence. The Magistrate had inferred that it was not a case of a temporary absence from the fact that there was picketing that day but that the closing was induced by the picketing. His Lordship the acting Chief Justice did not consider that circumstance material as he held that the condition did not amount to a prohibition of closing the shop at other hours in the absence of clear words to that effect.

MUNICIPAL BOARD, BENARES *v.* KANHAIYA LAL, I. L. R. 54 All. 6.

The point in this case was as to the powers of the Second Appellate Court in deciding questions of custom. After some conflict of opinion, the Madras High Court in a Full Bench decision in *Kumarappa Reddi* v. *Manavala Goundan*[1] decided that the High Court was bound by the findings as to the truth of the particular instances but the question as to whether the finding as to the existence and validity of custom was correct was a question of law which the High Court could consider. The Privy Council in *Mohesh Chunder Dhal* v. *Satrughan Dhal*[2], *Rup Chand* v. *Jambu Prasad*[3] and *Anant Singh* v. *Durga Singh*[4] has characterised the finding as to custom as a finding of fact while in *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi*[5] the same tribunal would seem to regard the questions as generally mixed questions of law and fact, "the Judge first finding what were the things actually done in alleged pursuance of the custom, then determining whether these facts found satisfy the requirements of law." This would seem to accord with the line of cases which hold that legal inference from established facts is a point of law, *e. g.*, permanent tenancy (*Nafar Chandra Pal Chowdhury* v. *Shukur Sheikh*[6] and *Dhanna Mal* v. *Moti Sagar*[7]), acquiescence (*Beni Ram* v. *Kundan Lal*[8]) and adverse possession (*Lachmeswar Singh* v. *Manowar Hossein*[9]). The view of the Full Bench in this case that the existence of the alleged practice is a question of fact does not seem to go further. Whether the number of instances given are sufficient for drawing the inference of custom, whether the departures are such as to detract from the uniformity or continuity that is required, whether the length of time during which the alleged practice has existed is sufficient

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1. (1916) I. L. R. 41 M. 374: 34 M. L. J. 104 (F. B.).
2. (1902) L. R. 29 I. A. 62: I. L. R. 29 C. 343 (P. C).
3. (1910) L. R. 37 I. A. 93: I. L. R. 32 A. 247: 20 M. L. J. 439 (P. C.).
4. (1910) L. R. 37 I. A. 191: I. L. R. 32 A. 363: 20 M. L. J. 604 (P. C.).
5. (1917) L. R. 44 I. A. 147: I. L. R. 40 M. 709: 33 M. L. J. 1 (P. C.).
6. (1918) L. R. 45 I. A. 183: I. L. R. 46 C. 189 (P. C.).
7. (1927) L.R. 54 I.A. 178: I.L.R. 8 Lah. 573: 52 M.L.J. 663 (P. C.).
8. (1899) L. R. 26 I. A. 58 : I. L. R. 21 A. 496 (P. C.).
9. (1891) L. R. 19 I. A. 48: I. L. R. 19 C. 253 (P. C.).

to constitute the usage "ancient" within the meaning of the rule as to custom and whether the individual cases are cases in which the persons acting acted under the consciousness that the custom was binding, which so much weigh in the ultimate finding as to custom, even in the "practice" aspect of it being admittedly questions of law, the mere finding as to the existence of a practice amounts to no more than saying that there have been so many general instances of acting in pursuance of the alleged custom.

GHULAM MUHAMMAD *v.* GHULAM HUSSAIN, L. R. 59 I. A. 74: I. L. R. 54 All. 93: 62 M. L. J. 371 (P. C.).

Some observations *incuria* of the Privy Council in *Maung Tun Tha* v. *Ma Thiti* led to a considerable flutter in the Indian Courts as to the applicability of Art. 123 of the Limitation Act. Their Lordships finally declare in this case that that case does not affect the line of authorities which hold that that article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate thus affirming the view taken in *Nurdin Najbudin* v. *Bu Umrao*[2] and *Rustam Khan* v. *Janki*[3]. Somehow the bearing of *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[4] on this question is not considered where Art. 123 was applied to a claim of legacy against an executor *de son tort* who cannot be said to be a person legally charged with the duty of distributing the estate.

The further questions that arose in the case were points of Muhammadan law. A testator had devised to one of his sons as "proprietor" a portion of his estate subject to the trust of maintaining the slaves and dependents of the family and after the death of the testator the mother acting on behalf of that son and another son who were both minors had entered into an arrangement with daughters and other heirs by which the latter surrendered their rights under the Muhammadan law for certain consideration recognising also the devise. The High Court held that it was a family arrangement and bound the sons *inter se*. The High Court also held that the devisee had no beneficial interest given to

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1. (1916) L. R. 44 I. A. 42: I. L. R. 44 C. 379: 32 M. L. J. 71 (P. C.).
2. (1920) I L.R. 45 Bom. 519. 3. (1928) I.L.R. 51 A. 101 (F. B.).
4. (1925) L. R. 52 I. A. 214: I. L. R. 48 M. 312: 48 M. L. J. 627 (P. C.).

himself and as such the devise though to one of the heirs was good. Their Lordships dissented from both these conclusions and held that the devise was only subject to a charge or trust and did not exclude all beneficial interest in the son—that the devise in favour of the son was bad to the extent of that beneficial interest in the absence of consent on the part of the other heirs, that the alleged family arrangement did not bind the sons as the mother had no authority to act on their behalf under the Muhammadan law and also because the arrangement did not determine the rights of the brothers *inter se* and that in those circumstances fact that the devise did not bind the sons did not have the effect of re-opening the arrangement so far as the other heirs were concerned. It was suggested before their Lordships that it was a wakf, servants and dependents being proper objects of a wakf. Their Lordships overrule the contention holding that servants and dependents were not within the Wakf Validating Act and that there cannot be a wakf for them in the absence of ultimate dedication to the poor.

BALKISHEN DAS *v.* BECHAN PANDEY, I. L. R. 54 All. 68.

The point involved in this case is one on which there is distinct cleavage of opinion between the Madras High Court on one side and the High Courts of Calcutta and Allahabad on the other, viz., as to when a sale deed has been executed by the vendor and put into the hands of the vendee and the vendee could have used the provisions of the Registration Act to get the deed registered, whether it is open to him to sue for specific performance and to have another deed executed and registered. The Calcutta and Allahabad High Courts hold that he can so sue; the Madras High Court holds that he cannot. According to the latter Courts, the only mode of getting the document registered is that provided by the Registration Act and the remedy of specific performance is not available. In *James Skinner* v. *R. H. Skinner*[1] the Privy Council overrule the decision of the Calcutta Court to this extent, viz., that the unregistered sale deed could not be used to prove the agreement in a suit for specific performance. The other question as to whether a suit for specific performance will lie has not been considered by the Privy Council. In the case under review there was a suit under S. 77 of the Registration Act but unfortunately the Court passed a wrong order directing the defendant to present the document for registration instead of permitting the plaintiff to present it for registration. Whether the peculiar features of the case would have made any difference in Madras is doubtful, for even so, the duty of the plaintiff was to get the decree set right in appeal.

SHIB DAS *v.* NAND LAL, I. L. R. 13 Lah. 178.

The soundness of this decision is open to doubt. The mother of a Hindu who succeeded to his property as his heir made a gift in favour of her daughter's son. The agnates of the fourth degree who were the then presumptive reversioners filed a suit for a declaration that the gift is invalid and not binding on the reversion and the Lower Court granted it accordingly. The donee appealed but before the appeal was heard, Act II of 1929 came into force. The learned Judges hold that the donee, as a sister's son of the last male owner, is a preferential heir to the deceased as he now comes earlier in the order of

1. (1929) L. R. 56 I. A. 363; I. L. R. 51 A. 771; 57 M. L. J. 765 (P. C.).

succession than the plaintiffs and the suit must accordingly fail. The latter conclusion however does not follow from the former. The donee, if he survives the widow, may exclude the plaintiffs under the new Act. But as the widow was still alive and as the succession has not opened, it cannot be assumed that the declaration would be futile. If the donee does not as a matter of fact survive the widow when the reversion actually opens, the heirs of the donee will have to surrender the property to the actual reversioners. Nor can it be suggested that the suit cannot be laid by the remoter reversioners, as on the facts it is clear that the nearest reversioner has precluded himself from suing on behalf of the reversion. In such circumstances the more remote reversioner can institute the suit on behalf of the reversionary estate. *Jhandu* v. *Tarif*,[1] *Rani Anund Koer* v. *The Court of Wards*.[2] It does not appear from the report whether the gift was of the whole estate of the last male owner, so as to let in the doctrine of surrender but even if it were so, the donee was not the next reversioner at the time of the gift in question and the particular gift therefore cannot be treated as a valid surrender. It may be that the widow and the donee may be able, in the altered state of the law, to enter into a fresh transaction defeating the rights of the reversioners but that cannot justify the conclusion that the suit as brought must fail.

It may also be noted that the Act does not say, in clear terms, that S. 2 will apply even to cases where the male owner, whose heirship is being regulated, died before the Act comes into force. It is true that there is no saving clause in favour of existing succession to estates of males who died earlier. It is therefore permissible to hold that, whenever after the coming into force of the new Act, the order of succession has to be decided, S. 2 thereof will apply. The expression "Hindu male dying intestate" in the preamble of the Act is, however, somewhat ambiguous. Where however the operative portion of the enactment is clear, the preamble cannot be relied on to curtail it. See *Secretary of State for India in Council* v. *Maharajah of Bobbili*.[3] *Attorney-General* v. *Brodie*.[4]

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1. (1914) I. L. R. 37 All. 45: 28 M. L. J. 453 (P.C.).
2. (1880) L. R. 8 I. A. 14: I. L. R. 6 Cal. 764 (P.C.).
3. (1919) L.R. 46 I.A. 302: I.L.R. 43 Mad. 529 at 536: 37 M.L.J. J. 724 (P.C.)
4. (1846) 4 M. I. A. 190.

MUSSAMMUT AFZAL-UN-NISSA *v.* FAYAZUDDIN, I. L. R. 13 Lah. 195.

The procedure of allowing numerous parties having a common interest to be represented by some of them for the purpose of a pending litigation is well established on general principles of convenience and necessity. O. 1, R. 8, Civil Procedure Code, provides for the matter in the trial court. There is nothing wrong or objectionable in allowing a similar principle in later stages like appeals. The mere existence of a decree in favour of several persons is not necessarily a bar to the exercise of such power by an appellate court in proper cases. We agree that S. 107 and S. 151, Civil Procedure Code, are of sufficient amplitude to justify such a procedure in an appeal also.

MUSSAMMAT MOTI BAI *v.* THE AGENT, NORTH-WESTERN RAILWAY, I. L. R. 13 Lah. 228.

The question in this case was whether the expression "unmarried sister" in the definition of the term "Dependent" in Act VIII of 1923 (The Workmen's Compensation Act) includes a sister whose husband is not alive at the time when the question arises. The learned Judge holds on the English authorities cited that the primary meaning of the term is no doubt a person who has *never* been married but that the secondary meaning is also possible if the context and circumstances indicate the same. Having regard to the policy of the Indian Act it was held in the above case that the expression "unmarried" was satisfied by the fact that the claimant had no husband alive at the time. We do not think that there is sufficient indication in the Act or the context to justify any other than the primary meaning of the term. No doubt actual dependence is not a condition precedent under the Indian law. But that circumstance is not by itself conclusive. If actual dependence is no criterion, there is no reason why a married adult daughter should be excluded while a widowed sister should be included. The expression "unmarried" in reference to the daughter is obviously used in the primary sense only and there is no reason why the same term in the same definition clause should have a wider significance in the case of a sister.

KIRPA RAM *v.* MUHAMMAD ZAHUR DIN, I. L. R. 13 Lah. 311.

A decree directing delivery of possession to the plaintiffs conditionally on their paying the defendants a certain sum of money was never executed. The defendants who had all along been denying the title of the plaintiffs held on for more than twelve years after the decree. The learned Judges held that the defendants were in adverse possession and perfected their title. The decree cannot be construed as creating the relationship of mortgagor and mortgagee nor that of landlord and tenant.

The defendants' possession for over 12 years after the passing of an unconditional decree for possession in favour of the plaintiff which was never executed has been held to create a statutory title. *Maharaja-Bahadur Kesho Prasad Singh* v. *Madho Prasad Singh.*[1] Similarly the Privy Council has held that a decree which provided for the defendants continuing to own their rights as jotedars so long as they were ready and willing to pay specified rent to the plaintiff could not be read as establishing the relationship of landlord and tenant between the parties and that the continued possession of the lands by the defendants without payment of rent for over the statutory period was sufficient to bar the plaintiff's claim. *Kumar Gopika Raman Roy* v. *Atal Singh.*[2] This latter decision of the Privy Council will directly govern the case under notice.

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1. (1928) 55 M. L. J. 251 (P.C.)
2. (1929) L. R. 56 I. A. 119; I. L. R. 56 C. 1003; 56 M.L.J. 562 (P.C.)

IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK, I. L. R. 59 Cal. 377 : 61 M. L. J. 589 (P. C.).

The decision in this case is one of considerable interest and importance as their Lordships have themselves observed. Stripped of details immaterial for the present purpose, the facts are that a Bank which had outstandings due from customers for which securities of immovable properties had been taken by deposit of title deeds assigned the outstandings to another Bank by two unregistered documents and the question was about the rights of the assignee Bank. The matter was somewhat complicated by an admission made on a former occasion that by reason of non-registration of the documents, *i. e.*, the debentures in the particular case, the immovable properties could not be affected. It is not clear what the decision would have been with respect to the immovable properties given as security but for the admission referred to.

One point is however made quite clear by their Lordships, namely, that in the cases of mortgage debts and debts which are otherwise charged on immovable properties, the debts remain distinct and are not merged in the immovable properties which are given as securities and do not become immovable properties for that reason. The result is, as their Lordships have pointed out, that the debts can be the subject of transfer apart from the immovable properties secured which securities themselves can only be transferred by act of parties only by a registered instrument under the Transfer of Property Act, as they are an interest in immovable properties. Their Lordships have also pointed out that the exclusion of mortgage debts from the definition of an "actionable claim" in S. 3 of the Transfer of Property Act as amended by Act II of 1900 has not the effect of making the debts, apart from the immovable property given as security, not transferable otherwise than by a registered instrument. The result of this pronouncement would seem to be that the decisions in *Perumal Ammal* v. *Perumal Naicker*[1], *Ehumalai Chetty* v. *Balakrishna Mudaliar*[2] and *Sakhiuddin Saha* v. *Sonaullah Sarkar*[3] to the extent to which they hold that, after the amendment, a mortgage debt can only be transferred by a registered instrument even with

1. (1920) I. L. R. 44 M. 196 : 40 M. L. J. 25.
2. (1921) I. L. R. 44 M. 965 : 41 M. L. J. 297.
3. (1918) 22 C. W. N. 641.

regard to the debt are no longer good law. Indeed, their Lordships have pointed out that such a debt though not an actionable claim under the Act is nevertheless a debt and that therefore the provisions of S. 134 which refer to debts and not to actionable claims, are applicable to such a case.

In view of their Lordships' decision, it may be noticed that the effect of the amendment is only that mortgage debts are excluded from the definition of the expression "actionable claims" wherever that expression is used in the Transfer of Property Act, but that nevertheless they are debts which are a species of property which are not prohibited from alienation by reason of S. 6 of the Act but which, on the other hand, are expressly made alienable by that section. If, therefore, they are debts and can be alienated under the provisions of S. 6 and they are not "actionable claims" to which the formalities for a transfer prescribed by S. 130 do not apply, it would seem that the debts can be transferred even orally. *See* S. 9 of the Transfer of Property Act. If, as has been pointed out, the debts, as such, could be transferred, the effect of such transfer would be that under S. 8 of the Transfer of Property Act, the security would also be transferred by operation of law. Cf. the principle underlying *Cuniah* v. *Gopal Chettiar*[4] and *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly*[5], *Dwarkadoss Govardandoss* v. *Devakoti Ammal*[6] and *Perumal Ammal* v. *Perumal Naicker*[1]. It may be that this aspect of the matter was not open before their Lordships by reason of the admission that the documents in the case required registration and not being registered would not affect any immovable properties.

It remains to notice what their Lordships seem to think is the consequence of the amendment. They observe that its effect is to restrict the statutory rights on transfer, such as the right to sue in the transferee's name, etc., to such transfers as are transfers of "actionable claims" as defined. Their Lordships further observe that the assignee bank can only enforce the debt in the name of the assignor bank which no doubt the latter must permit. While no exception can be taken to the previous statement which we understand as meaning that the

1. (1920) I. L. R. 44 M. 196 at 201: 40 M. L. J. 25.
4. (1918) 1919 M. W. N. 613 : 26 M. L. T. 242.
5. (1911) I. L. R. 37 M. 51 : 22 M. L. J. 105.
6. (1914) 15 M. L. T. 198.

provisions relating to "actionable claims" in the Act do not apply to a transfer of the debts in mortgage debts, it is not easy to appreciate the force of the latter observation. Once it is recognised that the debts, as such, are transferable under S. 6 of the Act, it is difficult to see the necessity of the transferor joining in the suit on the debts. Even in England, this necessity of the transferor joining in the suit was restricted to cases of legal choses in action which were not assignable at Common Law but whose assignment was recognised only in equity. The rule has no application to cases of equitable choses in action, such as, the right to recover a legacy or the interest in a trust fund, which were assignable in equity and to the cases of choses in action falling under S. 25 (6) of the Judicature Act of 1873 which is now re-enacted in S. 136 of the English Law of Property Act, 1925. If, therefore, in the cases of choses in action assignable at law or by statute, there was no need to join the transferor in the suit, there seems to be no necessity in this country even after S. 6 of the Transfer of Property Act to join the transferor in the suit on the debt.

JATEENDRAMOHAN MITRA *v.* PRABODHKUMAR DATTA, I. L. R. 59 Cal. 260.

One of the points laid down in this case is that even when one of the walls of a room belongs to the defendant and there is a window in that wall, the plaintiff who owns the room and the other three walls enclosing the room can acquire a right of easement of light by prescription through the window belonging to the defendant and in his wall and opening on his premises. To put it shortly, the learned Judges have held that the plaintiff can acquire an easement of light through the defendant's window for the plaintiff's premises. The decision itself has been given under S. 26 of the Indian Limitation Act as the Indian Easements Act does not extend, among other provinces, to Bengal. But the point will, we venture to submit, have to be answered in the same manner under the latter Act as well, as the terms of S. 15 of the Indian Easements Act are, for the present purpose, similar to those of S. 26 of the Limitation Act.

The confusion which led to the argument for the opposite view is based on the use of the expression "plaintiff's ancient lights" and understanding it as meaning "plaintiff's ancient

windows" which would imply that the windows themselves should be owned by the plaintiff. If, as pointed out in Goddard on Easements of the 7th edition, page 54, the expression used is "ancient light" and not "ancient window" and the latter phrase is nowhere used, it will be recognised that there is very little to support the argument. Further, as shown by the same author, the plaintiff's "right to light," as it is sometimes called, means really the curtailment of the neighbour defendant's right to build as he pleases or to refrain from building on his land in such a way as to hinder the access of light to the plaintiff's premises. This, indeed, is the true nature of an easement and is adopted in the definition of the term in S. 4 of the Indian Easements Act and has been elaborated in S. 7. *See*, especially, Illustration (*a*) to S. 7. In this view, a servient owner is prevented from building on his land so as to obstruct the access of light to the dominant heritage and it is immaterial if the aperture or window in respect of which the right is claimed and which in some respects is the measure of his right belongs to the defendant himself. It must, however, be noticed that the decisions in *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company*[1] and *Scott* v. *Pape*,[2] referred to by the learned Judges in the case under notice, have been shaken to some extent by the decision of the House of Lords in *Colls* v. *Home and Colonial Stores, Limited*,[3] though it may not strictly affect the present question. The point is clear if the language of the statute is given effect to, as the learned Judges have done, without trying to import considerations and notions foreign to the sections within their scope.

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1. (1877) 6 Ch. D. 757. 2. (1886) 31 Ch. D. 554.
3. (1904) A. C. 179.

MAHABIR SINGH *v.* DIP NARAIN TEWARI, I.L.R. 54 All. 25.

On the question as to how far the validity of a decree is open to examination in execution, that is to say either that it was rendered by a Court without jurisdiction territorial or otherwise, or that for any other reason it is a nullity there is a regular babel of decisions.

The judgment of Sir Sulaiman in this case strikes a hopeful mean which might afford a solution. The question here was as to whether it was open to the representative of a party who died before decree and whose representatives were not brought on record to show in execution that the decree was bad on that ground. The Officiating Chief Justice, with whom the other Judges of the Full Bench concurred, held that the question was not open in execution as the questions that can properly be investigated under S. 47, Civil Procedure Code, are questions relating to execution, satisfaction and discharge of the decree but not questions regarding the validity of the decree itself. His Lordship was also of opinion that the ancestor was not really a party within the meaning of the section, he having died before the decree just as a minor not properly represented has been held to be not a party. For that reason also His Lordship was of opinion that S. 47 did not apply.

Having held that he was not a representative it was easy to hold that the Court could pronounce that the decree was not binding against him while the decree was in execution though the order would not be an order under S. 47 but an order under O. 21, R. 58 or O. 21, R. 100 according to the stage at which the order is made.

His Lordship would apparently hold even in the case of parties that it is open to the Court to hold that the decree was a *nullity* though such order would not be conclusive but would be open to re-examination in a suit. If the decree was only voidable, the Court could not go into the question in execution but would have to leave it to be determined in a fresh suit. A further question discussed in connection with this matter was as to whether a party who defeated the application of the other side under S. 47 on the ground that it was not a matter for decision under that section but for a separate suit could defeat the suit subsequently brought by pleading S. 47 in bar of the suit. The Judges seem to be agreed that there would be no estoppel in the case as it would be against Statute to hold that

there was one. The rule of estoppel has been applied by the Privy Council in *Sadasiva Pillai* v. *Ramalinga Pillai*[1] so as to preclude a party who had agreed to payment of mesne profits being enforced in execution from afterwards resiling from the agreement and pleading that it was not a matter for execution. The ground assigned was that it was not a case of utter want of jurisdiction but of irregular procedure in respect of matters over which the Court has undoubted jurisdiction. This principle was applied so as to prevent the objection of S. 47, Civil Procedure Code, being taken in appeal in *Venkatakrishnama Charlu* v. *Krishna Rao*[2]. In other words, it was held that the objection not being one as to jurisdiction but one relating to procedure, it could be waived. This view has the support of numerous cases therein cited. In very similar circumstances to the present in *Jagannadha Rao* v. *Kurmayya*[3] it was held that the party was estopped. (See also *Ramgati Mohurer* v. *Pran Hari Seal*[4] and *Shashi Bhusan Mandal* v. *Ram Sebak Mandal*[5].) On this point, however, a dissenting note is struck in *Abdulla Koya* v. *Kallumpurath Kanaran*[6]. In *Sadasiva Pillai* v. *Ramalinga Pillai*[1] there was no question of contravening the provision of any statute, but having regard to the fact that it is open to the Court to convert the application under S. 47 into a suit so long as no question of jurisdiction as to subject-matter arises, the better conclusion would seem to be that the rule of estoppel might be given effect to. Another question that arose for consideration was as to whether the point of estoppel could be taken in appeal. Somewhat narrow view was taken of the admissibility of new points in appeal by the Full Bench in *Ram Kinkar Rai* v. *Tufani Ahir*[7]. The Chief Justice would confine the authority of that case to the question that directly arose in it, viz., as to whether the particular point raised in that case could be taken in appeal by a party. He suggests various circumstances among others considerations of public policy being one that might justify the entertainment of a new ground in appeal. His Lordship also points out that any way it is open to the Court itself in a proper case to raise the point in its discretion and determine it or have it determined. In *Ganga Ram* v. *Mutesra*[8], a case reported in this part,

1. (1875) L. R. 2 I. A. 219.
2. (1909) I. L. R. 32 M. 425.
3. (1907) 17 M. L. J. 314.
4. (1905) 3 C. L. J. 201.
5. (1914) 24 I. C. 181.
6. (1917) 33 M. L. J. 463.
7. (1930) I.L.R. 53 All. 65 (F.B.).
8. (1931) I. L. R. 54 All. 65.

a point of law arising on facts admitted—the point being an objection under O. 2, R. 2—it was held could be taken for the first time in appeal. This is what Lord Watson says in *Connecticut Fire Insurance Company* v. *Kavanagh*[9] with reference to this matter:

" When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea."

In *Ramlal Hargopal* v. *Kishanchand*[10] their Lordships felt bound "to take notice of an objection to the jurisdiction however late in the day it may be raised if it be that on the facts admitted or proved it is manifest there is a defect of jurisdiction". The plea of absence of jurisdiction will be entertained even though it was dropped in the lower appellate Court (*H. A. Brett* v. *Ellaiya*[11]) and was permitted to be raised by the Privy Council, though it was not raised in any of the Lower Courts and was not even mentioned in the grounds of appeal to the Privy Council. *Maha Prasad Singh* v. *Ramani Mohan Singh*[12] and *Bansilal Abirchand* v. *Ghulam Mahbub Khan*[13].

One other question that was considered was as to whether a suit on a mortgage can abate after the preliminary decree. The Allahabad High Court maintains the view taken in earlier cases that it can abate and dissents from the Madras view in *Perumal Pillai* v. *Perumal Chetty*[14].

RASHID AHMAD *v.* ANISA KHATUN, L. R. 59 I. A. 21 : I. L. R. 54 All. 46 : 62 M. L. J. 405 (P. C.).

This case is a warning to Muhammadan husbands who pronounce in thoughtlessness, anger, or for appearance sake and with ulterior motives talak in the triple form. Their Lord-

9. (1892) A. C. 473 at 480.
10. (1923) L. R. 51 I. A. 72: I. L. R. 51 C. 361: 46 M. L.J. 628 (P.C.).
11. (1869) 13 M. I. A 104.
12. (1914) L. R 41 I. A. 197: I. L. R. 42 C. 116: 27 M. L. J. 459 (P.C.).
13. (1925) L. R. 53 I. A. 58: I. L. R. 53 C. 88: 49 M. L. J. 806 (P.C.).
14. (1928) I. L. R. 51 M. 701: 55 M. L. J. 253 (F.B.).

ships hold that a person cannot get rid of the legal effect of the ceremony of talak by giving proof of his intention and showing that it was a fictitious act. The ceremony was gone through in this case, it was said, to please the father and the couple lived on in spite of it as husband and wife for fifteen years and had several children but to no effect. The law trifled with had its revenge and the wife was held to be no wife and the children illegitimate. Acknowledgment by the husband could not give them legal status in the absence of proof that the woman was married by another and divorced and then lived with the divorcing husband. Proof of living together as husband and wife was held by itself not sufficient to fill up the gap.

ALI MUHAMMAD KHAN *v.* ISHAQ ALI KHAN, I. L. R. 54 All. 57 (F. B.).

A plaint was filed in Court purporting to be by a minor, his mother acting as his next friend. He was a major at the time. The filing of the plaint, however, was with his knowledge and authority. The question was whether the defect could be remedied. The Full Bench holds that it is a mere irregularity and as such was not irremediable. The general trend of cases has been, as pointed out in this case, to regard all defects as to verification, signature, or presentation or authority as mere irregularities that are capable of being cured so long as the presentation has been with the knowledge and authority of the person concerned. Even if it has been without authority, there is nothing against the act being ratified so long at any rate as the other side is not deprived of the plea of limitation available to it.

NAND GOPAL *v.* BATUK PRASAD GUPTA, I. L. R. 54 All. 17.

The owner of two houses, while selling one of them with a construction on the intervening lane and in part resting on a wall of the other, reserved to himself the right to call upon the vendee at any time to remove the construction at his (vendee's) expense and keep the lane clear. The question in the case was whether this agreement could be enforced against the official assignee in whom the property vested on the insolvency of the vendee or his vendee. Their Lordships held that it could be. Whether viewed as a clause reserving an easement in favour of the vendor or as a covenant restricting the enjoyment by the purchaser for the beneficial enjoyment of the vendee's house (Ss. 11 and 40 of the Transfer of Property Act) or as a clause reserving an option to the vendor to revoke the easement in favour of the vendee (S. 39, Easements Act), there is no reason why it should not bind the official assignee or his vendees having regard to the principles laid down by the Privy Council with respect to the rights of the official assignee in *Sheobaran Singh* v. *Kulsum-un-nissa*[1]. The more difficult question was whether the clause amounted to any of these various things, or was a mere affirmative covenant which undoubtedly the clause relating to payment of costs was and which could not bind the purchaser (see *Smith* v. *Colbourne*[2], which somewhat resembles the case). In the determination of the precise nature of the agreement the ownership of the lane would have been a material circumstance but the report does not disclose any clue as to it. So far as the right to rest the construction on the wall of the unsold house was concerned the grant was of an easement and there does not seem to be any reason why the agreement should not be read as an option reserved which when exercised would terminate the easement (S. 39 of the Easements Act). If the lane also belonged to the vendor the position with respect to it would also be precisely the same. If it belonged to neither and both the vendor and the vendee had only an easement in respect of it the agreement would amount to an authority or licence to obstruct the enjoyment of the easement and 20 years' non-enjoyment might destroy the right under S. 47, the agreement notwithstanding—the agreement remaining alive thereafter merely for the purpose of giving a right of damages as against the actual party to the covenant or his representatives. Transferees would not be bound after the extinction of

1. (1927) L. R. 54 I. A. 204: I. L. R. 49 A. 367: 52 M. L. J. 658 (P. C.).
2. (1914) 2 Ch. 533.

the easement right. If the lane belonged to the vendee the agreement could be viewed as a covenant restricting enjoyment; then also, it would bind purchasers with notice which their Lordships held the purchaser in the case to be. The covenant in the case, however, seems to have been affirmatively expressed and would seem to be almost similar to that in *Smith* v. *Colbourne*[2] where the Court of Appeal held that it could not be read as implying a negative covenant restricting enjoyment. If the legal position should be considered as one of the creation of an easement in future it would be open to the vice of perpetuity. Gale on Easements, p. 8. If, on the other hand, it could be viewed as reservation of a present right of easement, it would not be open to any objection on that score (see *South Eastern Railway Company* v. *Associated Portland Cement Manufacturers, Ltd.*[3]) and non-exercise of that right might not extinguish the easement as the non-exercise would have been in pursuance of an agreement between the servient and dominant owners (S. 47, Easements Act, Explanation). A minor point as to notice also arose in the case. That is to say whether the registration of the deed of sale was notice to the purchaser of this reservation. As the reservation was not a transaction requiring registration the view of their Lordships that registration was notice does not seem to be correct but the same conclusion results from the application of the other well-known principle that notice of a deed is notice of its contents. It is impossible that the vendee from the Official Assignee should have been unaware of the sale deed which was the foundation of his title.

HANS NATH *v.* RAGHO PRASAD SINGH, L. R. 59 I. A. 138: I. L. R. 54 All. 189: 62 M. L. J. 544 (P. C.).

Pending a suit to enforce the customary right of pre-emption against the purchaser of a share in a village, the defendant acquired by gift from another co-sharer a small independent fractional share. If the gift had taken place before the suit that would have defeated the right of pre-emption. The question was whether the same thing taking place after suit defeated the right. *Per contra,* it was argued that the principle of *lis pendens* applied. Their Lordships point out that the principle of *lis pendens* renders the alienation of the subject-matter of the suit ineffective and could have no application to the present case where the defendant acquired some other share by gift. If,

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2. (1914) 2 Ch. 533. 3. (1910) 1 Ch. 12 at 15.

for instance, a sale or gift of the share forming the subject-matter of the gift takes place in favour of a co-sharer during suit, it would not, by reason of the principle of *lis pendens*, defeat the right of pre-emption though if the same transaction took place before suit, it would have defeated it. Their Lordships would not give a wider application to the rule of *lis pendens* and expressly negative any general doctrine of law that nothing occurring between the date of the suit and the decree could alter the relations between the parties. It was possible to hold that nothing that took place after the sale should affect the right of the co-sharer if the custom was that but that was not the custom as found by the Allahabad High Court. The custom as found disentitled the co-sharer to pre-empt if after sale or before suit (*i*) the co-sharer claiming pre-emption ceased to be such by partition, (*ii*) if the vendee became a co-sharer by any undisputed purchase or by a gift, and (*iii*) if the vendee transferred the property to another co-sharer. Their Lordships held that the principle of *lis pendens* is material only in case of the transfer of the subject-matter and not in other cases.

FAQIR CHAND *v.* AZIZ AHMAD, L. R. 59 I. A. 106: I. L. R. 54 All. 199: 62 M. L. J 492 (P.C.).

Properties *A* and *B* were mortgaged to *X* and then properties *B* and *C* were mortgaged to *Y*. In taking account of the value of *B* for the purpose of contribution is the whole amount of the mortgage to *X* to be taken into consideration or only the proportionate liability? This was the question before their Lordships in this case. Their Lordships overruling the opinion to the contrary of the Allahabad High Court held that it is only the proportionate liability that has to be taken account of and not the entire liability. The Allahabad High Court took the language literally and held that the amount of the incumbrance to which the property is subject could not be read as the proportionate amount to which it is by the application of the principle of the section liable. In arriving at this conclusion the High Court referred to the definition of the mortgage money in S. 58, and naturally this argument is not of much value as the word mortgage money does not occur in S. 82. The High Court held that the term incumbrance had a wider connotation than mortgage and would include even a permanent lease and as such did not attract the application of S. 82 in the assessment of its value. Their Lordships of the Privy Council while

agreeing that the word incumbrance has a wider connotation than mortgage, could not follow the High Court in the argument founded upon it. The section being one framed for the purpose of determining the ultimate liability, it would seem to be commonsense to read the section in the manner their Lordships have done. Their Lordships do not consider the changes effected in the section by recent legislative amendments but it does not seem that they effect any material change in this matter. The words substituted are " the amount of any mortgage or charge". The change takes the point from the argument of the Allahabad High Court by substituting the words " mortgage and charge " to both of which the principle of contribution enunciated in S. 82 is applicable. It would not, we apprehend, have the effect of preventing the Court from taking account of incumbrances such as permanent leases or attachments as those are factors to be considered in assessing the value of the mortgaged property. When the immoveable property mortgaged is subject to a permanent lease it is impossible to conceive how the mortgage can be held to comprise the leasehold right; the property comprised would only be the entire right minus the leasehold interest. In fact the direction as to deduction would seem to be totally unnecessary but for reducing the liability to the proportionate share of the prior mortgage amount. When the equity of redemption is mortgaged it is difficult to understand how the value of the property comprised in the mortgage could be arrived at without taking into account the prior mortgage. The provisions of the Transfer of Property Act do not keep the two ideas, viz., of physical property and the property comprised in the mortgage which might be a smaller right distinct and there is consequently a lot of confusion which it is to be regretted even the recent amendments have not entirely cleared though decisions of Courts have helped considerably to clarify the ideas on the subject.

Although their Lordships would not dismiss the suit for contribution on the ground of non-joinder of some of the parties who were liable to contribute the suit having been dismissed in the first Court also on the ground that no materials had been placed before that Court to enable it to arrive at a conclusion as to the value of those other properties comprised in the first mortgage their Lordships affirmed the order ofdismissal.

Their Lordships express no opinion on the important point of limitation considered in the first Court, viz., as to whether limitation for a suit for contribution under S. 82, Transfer of Property Act, arises from the date of payment or on the footing that the plaintiff is subrogated to the rights of the original mortgagee whom he has paid off, a point on which there is a sharp cleavage of opinion.

MAHOMED CHOTOO *v.* ABDUL HAMID KHAN, I. L. R. 10 Rang. 82.

A suit was brought by some of the heirs of a deceased Mahomedan for recovery of possession of their share in certain property belonging to the deceased in the hands of the defendant. The defendant had no right or title to, or to represent, the estate of the deceased but was in possession as a trespasser without any title. It was held in the case under notice that Art. 123 of the Limitation Act did not apply to the case. In the other High Courts it has been uniformly held that even if the defendant were not a trespasser but a co-heir, Art. 123 will not apply, as the co-heir in possession is not under any legal duty to distribute the estate between the other co-heirs. (See *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah*[1], *Umardaraz Ali Khan* v. *Wilayat Ali Khan*[2], *Mahomed Riasat Ali* v. *Hasin Banu*[3], *Nurdin Najbudin* v. *Bu Umrao*[4], *Mussammat Jano* v. *Narsingh Das*[5], *Rustam Khan* v. *Janki*[6], *Marian Beeviammal* v. *Kadir Meera Sahib Taragan*[7] and *Bai Jivi* v. *Bai Bibanboo*[8].) The question therefore of a trespasser defendant is in these Courts only *a fortiori*. *See* Mitra's Limitation, 6th ed., p. 1477, note (3). The cases cited as authority for the position were cases against strangers but the question was not discussed in them but assumed. *Kartick Chunder Ghuttuck* v. *Sundari Debi*[9] was one under Art. 127 and it has been held under that article in *Bhavrao* v. *Rakhmin*[10], *Malkappa* v. *Mudkappa*[11] and *Fakirappa* v. *Rudrappa*[12] that the plaintiff and defendant must both be members of a joint Hindu family. But in Rangoon it has been held almost consistently and in some cases the Court has even said that it is the settled and incontestable law that Art. 123 applies to a suit against a co-heir, unless after the succession opened, the co-heirs agreed to be in possession as tenants-in-common. See *Maung Po Kin* v. *Maung Shwe Bya*[13], *Ma Tok* v. *Ma Yin*[14] and *Maung Shwe An* v. *Maung Tok Pyu*[15]. In *Maung*

1. (1910) I. L. R. 34 M. 511 : 20 M. L. J. 288 (F. B.).
2. (1896) I. L. R. 19 All. 169.
3. (1893) L. R. 20 I. A. 155 : I. L. R. 21 Cal. 157 (P. C.).
4. (1920) I. L. R. 45 Bom. 519.
5. (1929) I. L. R. 11 Lah. 29.
6. (1928) I. L. R. 51 All. 101 (F. B.).
7. (1915) 29 I. C. 275.
8. (1928) 31 Bom. L. R. 199 : A. I. R. 1929 Bom. 141.
9. (1891) I. L. R. 18 Cal. 642.
10. (1898) I.L.R. 23 Bom. 137 (F.B.).
11. (1912) I. L. R. 37 Bom. 84.
12. (1931) 34 Bom. L. R. 354 : A. I. R. 1932 Bom. 255.
13. (1923) I. L. R. 1 Rang. 405.
14. (1925) I. L. R. 3 Rang. 77.
15. (1927) I. L. R. 5 Rang. 582.

Tun Tha v. *Ma Thit*[16] the Privy Council applied Art. 123 to the case of Buddhist co-heirs without discussion and that gave a stir to the settled views of the other High Courts on the question. (See *Shirinbai* v. *Ratanbai*[17].) But finally the Courts stuck to their view (*Nurdin Najbudin* v. *Bu Umrao*[4], *Rustam Khan* v *Janki*[6] and *Mussammat Jano* v. *Narsingh Das*[5]) and it is noteworthy that Rangoon also followed *Rustam Khan* v. *Janki*[6] in *Ma Bi* v. *Ma Khatoon*[18] in the case of Mahomedan co-heirs. The ground of distinction of *Maung Tun Tha* v. *Ma Thit*[16] suggested in these later cases, namely, that it is a case under the Buddhist Law, does not seem to be tenable though it was approved also in *Ma Bi* v. *Ma Khatoon*[18]. In fact in *Ma Nan Thu* v. *Ma Shwe Mi*[19] which is not referred to in *Ma Bi* v. *Ma Khatoon*[18] it was applied in Rangoon to a case of Christian co-heirs. Further *Maung Po Kin* v. *Maung Shwe Bya*[13] puts it on general principles and not as anything special to Buddhist Law. It was by virtue of *Maung Tun Tha* v. *Ma Thit*[16] to a certain extent that in *Rajah Parthasarathi Appa Rao* v. *Rajah Venkatadri Appa Rao*[20] Art. 123 was applied to the case of a defendant who was not an executor, but was in possession of the estate in circumstances which rendered him accountable in equity to those having claims upon the estate and inasmuch as in *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[21] the Privy Council have upheld the decision, it has to that extent received the imprimatur of the Judicial Committee. But now again in *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] the Privy Council have definitely stated that the Board in *Maung Tun Tha* v. *Ma Thit*[16] did not intend to overrule the long series of decisions of Indian Courts and in fact that there no question of limitation arose. The question may, therefore, arise as to how *Venkatadri Appa Rao* v. *Parthasarathi Appa Rao*[21] and *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] can both be dovetailed to give a consistent interpretation to Art. 123. In *Rajah Parthasarathi Appa Rao*

See notes 4, 5, 6 and 13 *supra*.

16. (1916) L. R. 44 I. A. 42: I.L. R. 44 Cal. 379: 32 M. L. J. 71 (P.C.).
17. (1918) I. L. R. 43 Bom. 845. 18. (1929) I. L. R. 7 Rang. 744.
19. (1925) 88 I. C. 609 : A. I. R. 1925 Rang. 233.
20. (1922) I. L. R. 46 M. 190 : 43 M. L. J. 486 (F. B.).
21. (1925) L. R. 52 I. A. 214: I. L. R. 48 M. 312: 48 M. L. J. 627 (P. C.).
22. (1931) L. R. 59 I. A. 74: 62 M. L. J. 371 (P. C.).

v. *Rajah Venkatadri Appa Rao*[20] Art. 123 was applied mainly as a result of *Maung Tun Tha* v. *Ma Thit*[16] though *Khetramani Dasee* v. *Dhirendra Nath Roy*[23] was also relied on. At page 246, Mr. Kumaraswami Sastriar, J., no doubt says that "whatever doubts there may be as regards cases of intestacy, I do not see any reason for holding that a suit for a legacy or for a share of a residue bequeathed by a testator can fall under Art. 123 only if it is against an executor and not if it is against one in possession of assets which are liable for payment of the legacies. The wording of Art. 123 is general. It refers to a suit for a legacy or for a share of a residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the article words which are not there, ..." It is submitted that if this reasoning is correct, then there is no reason why such a qualification should be made in the case of intestacy. There are no words in the article that the suit should be against a person who is bound by law to distribute, but the case-law has added that reservation from the words 'distributive share' in col. (1) and 'payable or deliverable' in col. (3). See also the observation of Sir Lancelot Sanderson at page 375 in the Law Journal Report of *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] that "Art. 123 assumes the existence of some one in a position who could distribute the estate". The statement at page 1479 of Mitra's Limitation (6th Edition) that for the application of Art. 123 the suit must be against "a person who is an executor under the will or otherwise represents the estate with the legal obligation to distribute the assets" may not be open to exception but to say, as Mr. Kumaraswami Sastri, J., puts it at page 247, that it should be enough if the legatee has a cause of action against the person in possession of the assets of the testator may not be quite accurate. In *Gur Bakhsh Singh* v. *Bhagwan Singh*[24] the article was applied as a logical extension to a suit by a legatee against a co-legatee in possession. It is difficult to find any duty in the co-legatee to distribute the estate. It is even diffi-

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See notes 16, 20 and 22 *supra*.

23. (1913) I. L. R. 41 Cal. 271.

24. (1923) 75 I.C. 934: A. I. R. 1924 Lah. 561.

cult to bring it under *Issur Chunder Doss* v. *Juggat Chunder Saha*[25] as the case of a person representing the estate. In *Gopala Chetti* v. *Narayanaswami Chetti*[26] Odgers, J., applied Art. 123 to a case where the executor did not enter on his duties but a third person took possession and was in management. The suit was for accounts, division and mesne profits. So far as the claim for division is concerned, it may be sought to be supported by *Rajah Parthasarathi Appa Rao* v. *Rajah Venkatadri Appa Rao*,[20] but how the claim to mesne profits can come under it, it is not clear from the report. After *Ghulam Mahammad* v. *Shaikh Ghulam Husain*[22] it has been held in *Swarnamoyee Dassi* v. *Prabodh Chandra Sarkar*[27] that the defendant must be an executor or administrator or some person legally charged with the duty of distributing the estate and therefore could not be applied to a case where the defendant was holding the property dehors the will under which the plaintiff claims.

The learned Judges in the case under review have left open the question whether failing Art. 123, Art. 142 or 144 will be applicable. The cases in *Lalu Sahu* v. *Ghunaria Uraon*[28], *Musammat Hulaso* v. *Salamat Khan*[29] and *Trilochun* (*alias*) *Koylash Chunder Chattapadhya* v. *Nubokishore Guttuck*[30] will throw light on the question. In *Lalu Sahu* v. *Ghunaria Uraon*[28] the last owner was in possession till his death and the third party defendant took possession only after his death and denied the right of legal heirs. In *Trilochun* (*alias*) *Koylash Chunder Chattapadhya* v. *Nubokishore Guttuck*[30] the trespasser was in possession even during the lifetime of the deceased. In *Maung Tun U* v. *Maung Myat Tha Zan*[31] Twomey, J., distinguishes *Ma Ye* v. *Maung Hla*[32] on the ground that in that case it was not against the representative of the deceased, whereas in the case before him, all persons interested in the estate of the deceased were made parties. But the learned Judge failed to see that so far as the claim was concerned, it was against one, who though a representative of the estate of *S*, claimed title in himself and therefore a stranger to that extent.

See notes 20 and 22 *supra*.
25 (1882) I. L. R. 9 Cal. 79.
26. (1925) 95 I. C. 33: 23 L. W. 528.
27. (1932) 36 C. W. N. 758 : 55 C. L. J. 420.
28. (1909) 2 I. C. 381.
29. (1914) 23 I. C. 521.
30. (1878) 2 C. L. R. 10.
31. (1913) 21 I. C. 335.
32. (1903) 2 L. B. R. 184.

SMITH *v.* KAILASH CHANDRA CHAKRAVARTHI, I. L. R. 11 Pat. 241.

"The difficulties of a litigant in India," said the Privy Council in 1872, "begin when he has obtained a decrée".

The position has not been very much improved since then, even after the lapse of six decades and notwithstanding the re-enactment of the Code of Civil Procedure by the Legislature. The conflicting views of Courts need not however be a factor which adds to the difficulties. It is unfortunate that the Courts should not give clear guidances as to how the decree-holder should act in one matter at least which is of fairly frequent occurrence, viz., the death of the judgment-debtor during execution proceedings. The Code is not so full as it might well be in reference to this matter. No doubt S. 50, Civil Procedure Code, provides for the execution of the decree against the legal representative if the judgment-debtor dies before the decree has been fully satisfied and O. 22, R. 12 expressly exempts execution proceedings from the operation of Rr. 3, 4 and 8 of the said Order. As there is no abatement in consequence of the judgment-debtor's death, the proceedings can be continued from the stage which they had reached. But what are the consequences if no legal representatives are brought on record before the actual sale? It is here that the Courts have taken divergent views. O. 21, R. 22, Civil Procedure Code, which requires notice to the legal representative to show cause why the decree should not be executed against him has been construed in the decision under notice as applicable at whatever stage the judgment-debtor dies. There is nothing in the terms of the rule itself which requires that the rule is applicable to cases of continuation of a pending execution application which has been already validly initiated against the judgment-debtor. The Madras Court holds that the operation of the rule may well be confined to the stage of the initial execution application. The decisions have taken the view that the issue of the notice under O. 21, R. 22 is a condition precedent to the foundation of execution proceedings and the absence of notice is a jurisdictional defect which makes the sale itself void and an absolute nullity. It is hardly necessary to have gone so far but the authority of the Privy Council decision in *Raghunath Das* v. *Sundar Das Khetri*[1] has compelled the Courts to hold so. See

1. (1914) L. R. 41 I. A. 251 : I. L. R. 42 C. 72 : 27 M. L. J. 150 (P. C.).

Rajagopala Aiyar v. *Ramanujachariar*[1]. The Courts should be reluctant to extend the principle of the absolute nullity of judicial sales. It is only when there is no legal power to sell at all that the sale should be held to be void. Other errors of procedure or wrong decisions of Court should merely be regarded as circumstances which may be good grounds for setting aside voidable sales. The decision under notice however dissents from the Madras view and holds on the authority of the Privy Council decision that the sale is a nullity because of the absence of notice under O. 21, R. 22 even at the later stage. The facts do not show when the judgment-debtor died and it is not clear if the Judges go so far as to hold that the sale will be a nullity even if the judgment-debtor dies just before the sale and if every one is ignorant of the same. There are good reasons to uphold such sales which are set out in *Dorasami* v. *Chidambaram Pillai*[2]. Whether some kind of representation at least of the deceased person's estate is not necessary before the sale can be sustained is a point on which some difference of opinion exists. The extreme view that has found favour with the Patna Court may well be modified so as to lessen the difficulties in the way of the decree-holder.

BAGESHWARI CHARAN SINGH *v.* JAGARNATH KUARI, L. R. 59 I. A. 130: I. L. R. 11 Pat. 272: 62 M. L. J. 296 (P. C.).

This decision of the Privy Council overrules the decision of the Bombay High Court in *Faki* v. *Khotu*[3] and approves of the view of West, J., in *Sakla Ram Krishnaji* v. *Madan Krishnaji*[4] as to the meaning of the word 'declare' in S. 17, cl. (1) of the Indian Registration Act. The distinction between a mere recital of an existing fact and something which operates in itself to change a legal relation in the immoveable property affected thereby is the test which will determine whether registration is necessary. The mere acknowledgment of an existing liability in respect of any property or right will require no registration as the document cannot be regarded as 'declaring' any right in immoveable property in the sense defined above. It may also be pointed out that under S. 49 the registered document cannot be received as evidence only of any *transaction*

1. (1923) I. L. R. 47 M. 288: 46 M. L. J. 104 (F. B.).
2. (1923) I. L. R. 47 M. 63: 45 M. L. J. 413.
3. (1880) I. L. R. 4 B. 590.
4. (1881) I. L. R. 5 B. 232.

affecting such property. It is difficult to hold that there is any transaction in the case of an acknowledgment of liability under S. 19 of the Limitation Act under the Indian law. In the particular case their Lordships hold that the document in question "contains a clear acknowledgment that unless one of two things is done she has no title or in other words that she recognises that the title is in the Thakur, her husband and not in herself". It is not so expressly stated in the document but it must be taken as a legal inference from admitted facts. An acknowledgment need not state every legal consequences of the thing acknowledged. Their Lordships must have applied this principle in construing the language of the document relied on. The petition praying for sanction of the prior gift or for a new deed of gift to be made is treated as an acknowledgment that there is no valid gift in law so far, and that the property continues to belong to the donor. In terms the parties merely expressed a doubt as to whether the deed of gift already executed was valid and prayed for sanction. Their Lordships must, however, have proceeded on the view that the doubt was not a *bona fide* one and that the real prayer was for sanction of a gift which was otherwise void and inoperative.

MUSSAMUT SHEORATAN KOER *v.* KAMTA PRASAD, I. L. R. 11 Pat. 415.

The soundness of this decision is open to doubt in so far as it holds that the defendant could not redeem over against the plaintiff. The plaintiff's right as puisne mortgagee who was not impleaded in the prior mortgagee's suit cannot be affected by that proceeding and he therefore had certainly a right to redeem the prior mortgage which had passed to the defendant auction-purchaser. But this does not enlarge his rights and cannot operate to confer on him an immunity from redemption of his own mortgage which the original mortgagor could exercise against him. The purchase in Court auction in the prior mortgagee's suit transfers to the purchaser not only the right of the prior mortgagee but also the rights of the mortgagor. As the owner of the equity of redemption vested in the original mortgagor, the auction-purchaser defendant could redeem over against the plaintiff. The omission to implead the puisne mortgagee in the first suit does not justify the view that the interests of the mortgagor do not pass to the

auction-purchaser in the first sale. The respective rights of the auction-purchaser and the mortgagee in such cases have been the subject of careful consideration in the Full Bench judgment of the Allahabad High Court in *Ram Sanehi Lal* v. *Janki Prasad*[1].

Justice Sulaiman, with whose judgment the majority of the Judges agree, discusses the question elaborately in the light of the principles which ought to govern the matter. No reference is made at all to that Full Bench judgment in the present decision but on the other hand it is rather facilely assumed that to allow a right of redemption of the plaintiff's puisne mortgage will destroy his rights as such mortgagee.

That the auction-purchaser in the improperly constituted suit of the prior mortgagee gets the rights of the mortgagor also, is the view of all the learned Judges. The previous proceedings are not a nullity. The auction-purchaser will have the same rights as if he had obtained an assignment of the rights of the encumbrancers who were parties to the suit and a transfer from the owner of the equity of redemption. Justice Mukerji also agrees with this view though he differs on some other points. Whether the puisne mortgagee has only a right of redemption of the first mortgage or whether he can bring his own suit for sale ignoring the prior mortgagee's suit is a point on which there is some difference of opinion in the Courts. So also the question which of the two auction-purchasers in the two suits brought by two simple mortgagees, each without impleading the other, is entitled to possession as ultimate owner is one on which the Courts have differed. *Chinnu Pillai* v. *Venkatasamy Chettiar*[2]; *Chinnasami Padayachi* v. *Darmalinga Padayachi*[3]. But there is no doubt that the purchaser in the prior mortgagee's sale can redeem the puisne mortgage before a sale takes place in the action of the puisne mortgagee.

1. A. I. R. 1931 All. 466 (F. B.).
2. (1915) I. L. R. 40 M. 77: 30 M. L. J. 347.
3. (1932) 63 M. L. J. 394.

MANOHAR DAS MOHANTA *v.* HAZARIMULL, I. L. R. 59 Cal. 463: 61 M. L. J. 343 (P. C.).

In this case, a mortgagee paid the arrears of revenue to avert a revenue sale under the Bengal Revenue Sales Act, S. 9, after the mortgagee had obtained final decree in a suit on his mortgage and pending the execution sale; and the question was whether he could maintain a second suit on the charge provided for under the section and in the mortgage deed. Their Lordships answered the question in the affirmative. What is more important is the reasoning underlying their decision and the conclusion that the payment is of the nature of a salvage payment made on behalf of all persons interested in the properties and that the payment entitled the person making it to a first charge in respect of the same on the properties or their sale proceeds. To this extent, their Lordships have affirmed the dictum in *Nagenderchunder Ghose* v. *Kaminee Dossee*[1] to the effect that apart from the statute such a payment would give the mortgagee making the payment a first charge. It may be noticed, in this connection, that the seventh defendant in the case under review was not only a puisne mortgagee but a prior mortgagee in respect of some of the items and their Lordships have declared a first charge in respect of the sale proceeds even as against him. We have no reason to doubt that their Lordships have given the first charge deliberately and not by mere oversight, as their Lordships have given the reason for doing so on the ground of the payment being of the nature of a salvage payment and on behalf of all persons interested, including, we believe, the prior mortgagee.

The observations in *Nagenderchunder Ghose* v. *Kaminee Dossee*[1] referred to above have not been given full effect in some of the High Courts, and it has been held by the Calcutta, Allahabad and Bombay High Courts that they have no application to a co-tenant making a payment and averting the revenue sale of the lands belonging to himself and his co-sharers while the Madras High Court has held in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararas*[2] that they apply to co-tenants as well. The decision of Sir V. Bhashyam Aiyangar

1. (1867) 11 M. I. A. 241 at 258.
2. (1903) I. L. R. 26 M. 686: 13 M. L. J. 83 (F. B.).

and Sir S. Subramania Aiyar, JJ., in the above case leave no aspect of the question untouched.

The point in the case is also the subject of legislative enactment under section 72 (*b*) of the Transfer of Property Act. Though the section as it originally stood had reference only to the case of a mortgagee in possession, the same principle has been applied even to cases of mortgagees not in possession. See *Nadershaw Sheriarji Rabadi* v. *Shirinbai Bapuji Musa*[1]. The recent amendment of the Transfer of Property Act has made section 72 applicable in terms to cases of mortgagees in possession and even without possession. The effect of the section is to give the mortgagee the right to add the revenue payment to his mortgage money giving it the same priority as his mortgage. But as we have pointed out above the observations in the case under notice seem to go further and declare a first charge in respect of the payment.

The question whether the payment of rent by a co-sharer gives him a first charge recently came up before the Madras High Court in *Vyraperumal Mudaliar* v. *K. Alagappa Maniagarar*[2] and has been answered in the negative. Rent has been declared a first charge on the holding by section 5 of the Madras Estates Land Act; but it was held by the Privy Council in *Arthur Henry Forbes* v. *Bahadur Singh*[3] under the corresponding provision of the Bengal Tenancy Act that such charge was only in favour of the landholder and while he continued to be such. It may well be doubted, whether the learned Judges in *Vyraperumal Mudaliar* v. *K. Alagappa Maniagarar*[2] have given full effect to the decisions in the case under notice and *Nagenderchunder Ghose* v. *Kaminee Dossee*[4] and *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz*[5].

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1. (1923) 25 Bom. L. R. 839 at 843.
2. (1931) 34 L. W. 889.
3. (1913) L. R. 41 I. A. 91: I. L. R. 41 C. 926: 27 M. L. J. 4 (P. C.)
4. (1867) 11 M. I. A. 241.
5. (1903) I. L. R. 26 M. 686 : 13 M. L. J. 83 (F. B.).

RIPON PRESS AND SUGAR MILL CO., LTD., BELLARY *v.* GOPAL CHETTI, L. R. 58 I.A. 416: I. L. R. 55 Mad. 180: 61 M. L. J. 783 (P. C.).

Neither the Courts nor the lawyers in this country are quite familiar with Company Law, Companies being not much in evidence here and it is not surprising that what appear to lawyers in England steeped in Company Law to be unjustifiable mistakes are sometimes perpetrated in the administration of that law. The rather strongly worded judgment of Lord Blanesburgh is useful in that it pointedly draws attention to the caution that is necessary in the administration of that Law. In the first place, His Lordship makes it clear that in the case of a solvent company which is sought to be wound up on the ground that "it is just and equitable to do so," neither the fact that one person has a preponderating influence by reason of his owning or controlling a large number of shares nor the fact that dividends have not been regularly paid nor yet the fact that some *ultra vires* transactions have been entered into by the directors is a reason for making a winding-up order and that both in making the order of winding up and in making orders in the course of winding up, the Court must have regard to the wishes of contributories. His Lordship indicates that acts done by the directors with such consent even after the winding-up order ought to be supported, when there are no creditors whose interests are likely to be prejudiced by such acts and that even it the Court finds reason to set them aside, the Company must be made to restore the benefit obtained by such transactions.

As a point of practice His Lordship points out that appeals from winding-up orders should be in the name of the Company and also indicates that leave for appeal should be given when the majority of the contributories are against winding up. His Lordship further impresses on Courts the necessity for promptness in the disposal of appeals in the case of winding-up petitions and in this case, having regard to the long lapse of time, during which time the winding-up order was in operation, His Lordship refused to disturb the order of winding up though he considered that it ought never to have been made.

The judgment contains valuable observations as to the conduct of official liquidators. His attitude must be one of complete impartiality and his duty in an appeal from an order is in the interests of the whole body of his constituent contributories to be ready to inform the Court of any facts and

circumstances in relation to the company's affairs about which he might be asked or which in his judgment the Court ought to know.

KADIYALA VENKATASUBBAMMA *v.* KATREDDI RAMAYYA, L. R. 59 I. A. 112: I. L. R. 55 Mad. 443 : 62 M. L. J. 365 (P. C.).

Their Lordships affirm, in this case, the view of the Madras Full Bench in *Ramiah* v. *Venkatasubbammal*[1] as against the Calcutta view as expressed in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu*[2] and *Sakina Bibee* v. *Mahomed Ishak*[3] and hold that the executor under a Hindu will executed in the mofussil has all the powers of an executor under the Probate and Administration Act and the property also vests in him though no probate has been taken out. On the language of S. 90 as it stood before 1889, there might have been some support for the contrary view but on the terms of the section as amended in 1889, there could be no doubt. In *Administrator-General of Bengal* v. *Prem Lal Mullick*[4] and *Kurrutulain Bahadur* v. *Nusbat-ud-dowla Abbas Hossein Khan*[5] the contrary view seems to be assumed but their Lordships had no occasion to consider the point or to express an opinion as between the two contending views. The contrary view was largely based on the preamble which showed that the object of the Act was to provide for grant of probate and letters of administration and upon the heading of Chapter II which their Lordships consider is not justified. In England the title of the executor is derived from the will and not from the probate though it is the probate alone that authenticates the right. The same is the case under the Succession Act of 1865. There is no reason to hold, their Lordships think, that a different rule was intended under the Probate and Administration Act though the absence of a provision like S. 187 of the Succession Act (corresponding to S. 213 of the present Act) in the case of mofussil wills avoids the necessity for a probate in order to establish the right under the will. While in cases to which that provision applies, an alienation by an executor cannot be maintained by reference to his powers as such so long as probate

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1. (1925) I. L. R. 49 Mad. 261: 50 M. L. J. 308 (F.B.).
2. (1898) I. L. R. 25 Cal. 103. 3. (1910) I. L. R. 37 Cal. 839.
4. (1895) L. R. 22 I. A. 107. I. L. R. 22 Cal. 788: 5 M. L. J. 157 (P. C.).
5. (1905) L. R. 32 I. A. 244: I. L. R. 33 Cal. 116: 15 M. L. J. 336 (P. C.).

is not taken out in the case of mofussil wills it can be so done though even in the former case when once the probate is taken out, alienations prior to such taking out of probate can be supported by reference to his powers as executor.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SUBBARAYUDU, L. R. 59 I. A. 56: I. L. R. 55 Mad. 268: 62 M. L. J. 213 (P. C.).

This case sets at rest the controversy that has been going on about the true construction of the words "river belonging to the Government" and "engagement" in the Madras Irrigation Cess Act. Their Lordships hold that a river cannot be said to belong to Government unless the solum belongs to the Government which will happen when the Government is the proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable and that this meaning has not been affected by the Land Encroachment Act. Their Lordships also hold that natural rights are within the engagement implied in the permanent settlement and therefore also within that expression in the Irrigation Cess Act.

The judgment of their Lordships also contains a valuable exposition as to the scope of the riparian rights. Their Lordships would seem to restrict the duty referred to in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*[1] and *McCartney* v. *Londonderry and Lough Swilly Railway Company*[2] of restoring water to cases of diversion of the stream and when only part of the stream is taken for purposes of irrigation the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on practically undiminished. In the matter of riparian rights there is no difference between tidal or navigable rivers and other rivers for the rights of the riparian owner do not depend on the ownership of the soil of the stream but on vicinity and those rights extend if necessary to complete exhaustion for what are known as primary rights, *i. e.*, for domestic use and to the limited extent indicated above for other uses connected with land of which irrigation is one. The riparian right is, their Lordships point out, a natural right and as such is not capable of being lost *non utendo* (by non-user)

1. (1875) L. R. 7 H. L. 697. 2. (1904) A. C. 301 at 307.

and to it the maxim *tantum prescriptum quantum possessum* (restricting prescriptive right to the extent of user) has no application. Subject to the right of the lower proprietor (in this case there was no complaint by any lower proprietor) the higher proprietor has an absolute right to take the water and use it for irrigation of his property.

RAMASWAMI AIYAR *v.* RANGASWAMI AIYAR, I. L. R. 55 Mad. 26: 61 M. L. J. 933.

A fiscal statute should be construed strictly and cannot be extended by analogy. The attempt made on behalf of the Crown in this case was to charge the claim of the creditor who put in his claim in pursuance of a direction under a preliminary decree in a suit for administration brought by another creditor as if it were a plaint but it is neither a plaint nor a set-off nor as their Lordships point out is the action a representative action. If the action by the creditor is barred at the time of the judgment he cannot make a claim. The action may be withdrawn by the creditor suing; his suit cannot proceed if the executor pays his debt into Court (*Shashi Bhushan Bose* v. *Manindra Chandra Nandy*[1], *Athalur Malakondiah* v. *Lakshminarasimhalu Chetty*[2] and *Bray* v. *Tofield*[3]). An administration suit is regarded in Ireland however as a representative suit. Even so, it is not clear how court-fee can be levied from the creditor putting in his claim. It may be a ground for making the creditor suing to pay for the other people's claims also.

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1. (1916) I. L. R. 44 Cal. 890. 2. (1914) 26 M. L J. 312.
3. (1881) 18 Ch. D. 551.

SAMUVIER *v.* RAMASUBBIER, I. L. R. 55 Mad. 72 : 60 M. L. J. 527.

In this case their Lordships dissent from *Venkataratnam* v. *Subba Rao*[1] which took the view that a release of a partner of his interest in certain immovable property belonging to the partnership in favour of the other members did not require registration and we think rightly. Partnership is not a corporate entity distinct from the partners and the partners are the joint owners of all the partnership property and a release by one partner of his interest necessarily involves a transfer of interest in immovable property. The right of a member of a Hindu family to which the right of a partner has been compared in the immovable property of the family has been always treated as immovable property and a release by him of his interest would require registration if in writing. Because the incidents of the joint ownership involved in partnership are different from those involved in ordinary tenancy in common, or joint tenancy, or the joint tenancy of a member of a Hindu family, it does not follow that it is any the less an interest in immovable property. In the converse case of a man going to be a partner transferring lease belonging to himself to the partnership it has been held that the deed requires registration, *Arseculeratne* v. *Perera*[2]. Similarly a floating charge on the assets of a Company has been held to require registration if the charge is claimed on that portion of the assets which are represented by immovable property. *The Imperial Bank of India* v. *The Bengal National Bank*[3].

The further question in the case was as to whether a document which cannot affect the immovable property by reason of non-registration can affect movables or can stand in respect of other stipulations not connected with the immovables and which if they stood alone could be enforced. We think the true test has been suggested in this case. The whole question is whether the different parts are so interconnected that it may be safely assumed that the validity of the one part was condition precedent to the enforcing of the other. In the case of a charge on the movables as well as immovables, there is no reason why one part should not be enforced while

1. (1926) I. L. R. 49 Mad. 738: 51 M. L. J. 410.
2. (1928) A. C. 173.
3. (1931) 61 M. L. J. 589 (P.C.).

the other may not be. *The Imperial Bank of India* v. *The Bengal National Bank*[1]. Similarly in the case of gifts. *Perumal Ammal* v. *Perumal Naicker*[2]. In the case of partition there is no reason when an aliquot share is allotted of the movables and a separate aliquot share of immovables to each sharer, why the one should not stand while the other may not. The case would be quite different if one sharer is given immovable property and the other movable only, the extra share in each being the *quid pro quo* for the extra share in the other. *Lakshmamma* v. *Kameswara*[3] is typical of the latter class, *Thandavan* v. *Valliamma*[4] of the former. S. 85 of the Contract Act is a statutory illustration of the same rule. In *Arseculeratne* v. *Perera*[5] while recognising that if during the currency of the partnership the plaintiff had sought to compel the defendant to put the mine at the disposal of the Company (which for want of registration of the partnership agreement had failed to pass to the partnership) and the defendant had refused to do so, the *substratum* of the partnership would have disappeared and the partnership must have been dissolved, the partnership having continued in spite of it, their Lordships directed accounts to be taken of the partnership business overruling in that respect the judgment of the Lower Court which had dismissed the action in the view that the agreement was one and indivisible and the stipulation as to the transfer of the lease being ineffective, the whole agreement was void and of no effect.

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1. (1931) 61 M. L. J. 589 (P. C.).
2. (1920) I. L. R. 44 Mad. 196 : 40 M. L. J. 25.
3. (1889) I. L. R. 13 Mad. 281.
4. (1892) I. L. R. 15 Mad. 336 : 2 M. L. J. 130
5. (1928) A. C. 173.

MAHARAJADHIRAJ KAMESHWAR SINGH BAHADUR *v.* BENI MADHO SINGH, I. L. R. 11 Pat. 430.

A decree for mesne profits against a Hindu widow, on the ground of an unauthorised encroachment by her on the plaintiff's property and illegal perception of the profits thereof is one which is *prima facie* against her personally and not against the estate represented by her. It may be otherwise if there is evidence to show that it was in assertion of the right of the husband's estate to the trespassed properties that the widow committed the act of trespass and received the profits. Even in the latter case, only if she had also been sued in her representative capacity, the decree could be executed, on the death of the widow, against the estate of the husband in the hands of the reversioners who succeed to it. If the reversioners are to be made liable, it should be established that not only that the foundation of the decree is a liability which is binding on the reversioners but the suit also must have been so framed as to seek for a decree against the widow in her representative capacity. *Lalit Mohan Pal Roy* v. *Dayamoyi Roy Chowdhurani*[1]. See also *Sethurama Aiyar* v. *Varadaraja Aiyar*[2]. The decision under notice no doubt rightly lays down the law as stated above but it is not clear whether the application of it to the facts of the case is quite correct. The widow had appealed against the decree granting mesne profits against her but as she died during the pendency of the appeal the reversioner to the husband's estate got himself impleaded as the legal representative to continue the appeal. This could only have been on the allegation of the reversioner that the widow was not being sued personally but only in a representative capacity and that the cause of action had survived to him. Otherwise he would not have been added as a party to the appeal, as the proper legal representative would have been the heir-at-law of the widow herself. In those circumstances the reversioner could not be allowed when his appeal was dismissed ultimately to turn round and say that the decree of the Trial Court was not against the estate but only against the widow in her personal capacity. In *Rajah of Ramnad* v. *Sundara Pandiyasami*[3] the Privy Council held it was too late for the defendant to object in appeal before

1. (1926) 52 M. L. J. 426 (P. C.). 2. 1931 M. W. N. 1282.
3. (1918) L. R. 46 I. A. 64 : I. L. R. 42 Mad. 581 : 36 M. L. J. 164 (P. C.).

the Privy Council that the reversioner who had been brought on record without objection as legal representative of the plaintiff widow during the trial of the suit in the Court of first instance was not really the proper legal representative even as regards a part of the suit claim. The present case would seem to be a stronger one for holding that the reversioner who himself urged and got the Court to accept his position as legal representative is estopped from contending to the contrary in later proceedings such as execution of the ultimate decree.

NAGENDRA NATH DEY *v.* SURESH CHANDRA DEY, L. R. 59 I. A. 283: 63 M. L. J. 329 (P. C.).

This decision is of far-reaching importance and settles a controversy that has remained unsettled for several years past. The point decided is as to the meaning of the term "appeal" in column three of Art. 182 (2) of the Limitation Act. The judgment under notice sets out briefly the conflicting decisions but proceeds to decide the meaning of the term, as their Lordships say, upon the plain words of the article. They say that there is no warrant for reading into the words quoted any qualification as to the *character* of the appeal or as to the *parties* to it (the italics are ours). "Equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide." This rule of interpretation emphasised by their Lordships is sure to be relied on in future decisions as to the construction of various other articles in the Limitation Act. The controversy as to "suspension of limitation in cases which do not come strictly under S. 9 or S. 14" is one such instance in point.

An appeal is, according to this judgment, in the absence of any statutory definition, "an application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court. An appeal is no less an appeal because it is irregular or incompetent." It will be noticed that in the particular case the party to the original suit purported to file an appeal against a particular decision of the Subordinate Judge, negativing his rights. There was as a matter of fact a right of appeal to the High Court against that decision though the party appealed against the order and not against the decree which was drawn up. The appeal was dismissed as irregular for want of

sufficient stamp and it failed on the merits as well, when it was heard finally after notice to the respondents. In those circumstances their Lordships rejected the contention that there was no appeal at all but only an abortive attempt to appeal. Their Lordships also decide categorically (settling the controversy on this point among the High Courts) that an appeal need not necessarily imperil the whole decree nor is it necessary that the persons against whom the new starting point is sought to be enforced should be parties to it. The generality of language used as regards the term "appeal" cannot be extended however, irrespective of the actual facts. It may still be that every abortive attempt to appeal cannot be regarded as an appeal for the purpose of this article. Different considerations may arise in other cases as for instance where a party seeks permission to file an appeal after excusing the delay under S. 5 of the Act and the permission is refused or where a person not a party *eo nomine* to the suit seeks to prefer an appeal against a decree as one purporting to be aggrieved by the decree and the same is not allowed by the appellate Court in the view that the appellant has no *locus standi* to prefer the appeal. More light would have been available if their Lordships had discussed the reasoning of the conflicting High Court judgments on this point.

NAGARMAL MARWARI *v.* KING-EMPEROR, I. L. R. 11 Pat. 493.

The interpretation of the terms of O. 21, R. 46, Civil Procedure Code, adopted by this judgment, as regards the correct mode of attachment of moveable properties of the judgment-debtor in the *physical* possession of third persons is a wholesome one. The Code provides carefully in a fasciculus of clauses for varying modes of attachment suited to the nature of the property. The attachment is a real thing different from the order of a Court directing attachment. See *Muthiah Chetty* v. *Palaniappa Chetty*[1]. If the actual possession of the moveables is with a third person, the attachment can only be by an order of prohibition under cl. (3) of O. 21, R. 46. If the third person has merely the custody on behalf of the judgment-debtor

1. (1928) I. L. R. 51 Mad. 349: 55 M. L. J. 122 (P. C.).

MACKAY *v.* MAHARAJADHIRAJ KAMESHWAR SINGH, I. L. R. 11 Pat. 600: 63 M. L. J. 270 (P. C.).

This judgment decides an important point as to the locality of the relevant market for the purpose of estimating damages for failure to deliver goods as per contract between the parties. The place of delivery contemplated by the parties was Purnea, but the evidence showed that the actual market where the goods in question (indigo seed in this case) were bought and sold and to which the buyers and sellers in Purnea resorted for the commodity required at Purnea was Cawnpore, a place 300 miles away. Their Lordships held that there is no absolute rule of law that the place of delivery fixed is the locality of the relevant market and that the Lower Courts went wrong in holding that there was no market price that could be ascertained. The question as to what is the locality of the relevant market is one of fact to be decided upon the evidence as to where the intending buyers and sellers usually transact the sales for delivery of the goods at the stipulated place. It is a well-established usage in the case of certain articles that transactions of sale and purchase are carried on only in a central market at a particular place from which the goods are sent to all other places round about. The actual area for which a central market thus functions may depend upon the usage and other circumstances of the particular line of mercantile business. In such cases, the market price as on the date of breach may well be ascertained by ascertaining the market price at the place where the commercial transactions usually take place and then making the necessary allowance for cost of transit to the actual place of delivery agreed upon.

The judgment of the Privy Council also corrects some other fallacies of the Lower Court. In calculating the damages the High Court went wrong in ascertaining the market price on the basis of the price of the goods on an earlier date for forward delivery on the date of breach. This is incorrect and it is only the difference between the market price of spot goods on the date of breach and the contract price, that can be decreed as the damages sustained.

It will be noted that the Privy Council allows the buyer not only a refund of the earnest money advanced by him but also interest thereon at 12 per cent. till date of decree. The Madras

High Court decided by a majority view (prior to Act III of 1930) that interest cannot be claimed under such circumstances (Justice Ramesam dissenting) notwithstanding the illustrations to S. 73 of the Indian Contract Act. No reference is however made to this decision, *Kandappa Mudaliar* v. *Muthusami Aiyar & Sons*[1], by the Privy Council judgment and it is not clear if the said Full Bench decision of the Madras Court should be deemed to be impliedly overruled. (Our reporter writes to us to say that the point as to interest was not argued.—Ed.) S. 61 of Act III of 1930 however now empowers the Court to award interest.

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1. (1926) I. L. R. 50 Mad. 94: 51 M. L. J. 765 (F. B.).

ARUNACHALAM *v.* VEERAPPA CHETTIAR, I. L. R. 55 Mad. 17: 61 M. L. J. 348 (F. B.).

A Full Bench of five Judges hold in this case that O. 9, R.13 does not apply to such execution proceedings as fall within S. 47, Civil Procedure Code. In *Alagasundaram Pillai* v. *Pichuvier*[1] it was held by a Full Bench that neither O. 9, R. 9 nor S. 151 enabled the Court to restore an application under R. 97 or 98 of O. 21 dismissed for default. Their Lordships recognise that that conclusion might involve real hardship in some cases. But the remedy, they think, is in the hands of legislature. An order made in circumstances in which a party has had no real opportunity to be heard may not operate as *res judicata, Mochai Mandal* v. *Meseruddin Mollah*[2], *Monmohan Karmokar* v. *Dwarka Nath Karmokar*[3] and *Alikjan Bibi* v. *Rambaran Shah*[4]; and in that sense there may not be much of a hardship though it may be doubted if that would protect in all cases in which O. 9, R. 13 might protect. The hardship may be greater in cases of dismissal for default, though no doubt the non-application of the order also excludes the application of the rule in O. 9, R. 9 which precludes a fresh suit on the same cause of action and as such a fresh application on the same facts would not be barred. But the consequence of the dismissal might be serious where rules of limitation like those enacted in Arts. 181, 182 or 166 or in S. 48, Civil Procedure Code, might operate in bar of a fresh application. Relief might be given in a few cases treating the fresh application as a continuation of the old proceeding. See *Ramanuja Aiyangar* v. *Narayana Aiyangar*[5]. In some limited cases, appeal to inherent powers also may be made. See *Debi Bakhsh Singh* v. *Habib Shah*[6] and *The Bolivar*[7]. Can a Court dismiss for default of appearance merely when there is no rule enabling it to do so? If appeal to inherent powers is admissible for the purpose of enabling it to do so, could not appeal be made to the same powers to restore an application dismissed for default? The trend of decisions in the Madras High Court would seem to be against appeal to such powers.

[END OF VOLUME LXIII.]

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1. (1929) I. L. R. 52 Mad. 899: 57 M. L. J. 381 (F. B.).
2. (1910) 13 C. L. J. 26.
3. (1910) 12 C. L J. 312.
4. (1910) 11 C. L. J. 357.
5. (1895) I. L. R. 18 Mad. 374.
6. (1913) L. R. 40 I A 151: I. L. R. 35 All. 331: 25 M. L. J. 148 (P.C.).
7. (1916) 2 A. C. 203.